

1 UNITED STATES DISTRICT COURT	1 ----- I N D E X -----
2 SOUTHERN DISTRICT OF NEW YORK	2 WITNESS EXAMINATION BY PAGE
3 -----x	3 COLIN WEIR MR. WING 4
4 JOANNE HART, and SANDRA BUENO, on behalf of	4
5 themselves and all others similarly situated,	5
6 Plaintiffs,	6 ----- INFORMATION/DOCUMENT REQUESTS -----
7 vs.	7 PAGE: 161 Spreadsheet reflecting the use of
8 BHH, LLC d/b/a Bell + Howell and VAN HAUSER LLC,	8 economic indices
9 Defendants.	9
10 Case No. 1:15-cv-04084-WHP	10
11 -----x	11 ----- E X H I B I T S -----
12 888 Seventh Avenue	12 DEFENDANT DESCRIPTION FOR I.D.
13 New York, New York	13 Exhibit 1 Statement of Qualifications 44
14	14 Exhibit 2 Subpoena 72
15 January 10, 2018	15 Exhibit 3 Spreadsheet Document 138
16 9:31 a.m.	16 Containing Walmart Sales
17 DEPOSITION of COLIN WEIR, taken pursuant	17 Data
18 to Notice, before Toni Freeman Greene, a Notary	18 Exhibit 4 Spreadsheet Document 141
19 Public of the State of New York.	19 Exhibit 5 Spreadsheet Document 142
20	20 Exhibit 6 Spreadsheet Document 145
21	21 Exhibit 7 Spreadsheet Document 214
22	22 Exhibit 8 Spreadsheet, walmart Sales 248
23	23 Data
24	24
25	25 (EXHIBITS TO BE PRODUCED)
1	3
1 A P P E A R A N C E S:	1 C O L I N W E I R,
2	2 the witness herein, having been first duly
3 BURSOR & FISHER, P.A.	3 sworn by a Notary Public, was examined and
4 Attorneys for Plaintiffs	4 testified as follows:
5 888 7th Avenue	5 THE REPORTER: would you state and
6 New York, New York 10019	6 spell your full name and state your address
7 BY: JOSHUA ARISOHN, ESQ.	7 for the record, please.
8 (646) 837-7103	8 THE WITNESS: My name is Colin B.
9 jarisohn@bursor.com	9 Weir, C-O-L-I-N, middle initial B, last
10	10 name W-E-I-R. My business address is
11	11 1 Washington Mall, Floor 15, Boston,
12 LEAHY, EISENBERG & FRAENKEL, LTD.	12 Massachusetts 02108.
13 Attorneys for Defendants	13 EXAMINATION
14 33 West Monroe Street	14 BY MR. WING:
15 Suite 1100	15 Q. Good morning, Mr. Weir. My name is
16 Chicago, Illinois 60603-5317	16 Scott Wing. We met earlier.
17 BY: SCOTT WING, ESQ.	17 You are here on behalf of the
18 ADAM MCCABE, ESQ. (via telephone)	18 Plaintiffs in the case titled Joanne Hart and
19 (312) 368-4554	19 Sandra Bueno vs. BHH LLC and Van Hauser LLC as a
20 sw@lefltd.com	20 26(a)(2) expert witness under the Federal Rules,
21	21 correct?
22	22 A. I'm not a lawyer, but I believe that's
23 ALSO PRESENT:	23 right.
24 STEFAN BOEDEKER (via telephone)	24 Q. You were a retained expert on behalf
25	25 of the Plaintiffs in that case, correct?
2	4



<p>1 WEIR</p> <p>2 A. Yes, sir.</p> <p>3 Q. And that case, to your understanding,</p> <p>4 is a class action lawsuit involving ultrasonic</p> <p>5 pest repellers, correct?</p> <p>6 A. The Bell &amp; Howell pest repellers.</p> <p>7 Q. Mr. Weir, what is your highest level</p> <p>8 of education?</p> <p>9 A. I hold an MBA from Northeastern</p> <p>10 University and, I don't know whether or not it</p> <p>11 will become relevant in this case, but, I have</p> <p>12 advanced training in conjoint analysis.</p> <p>13 Q. When you say "advanced training in</p> <p>14 conjoint analysis," where was that advanced</p> <p>15 training?</p> <p>16 A. It's postgraduate work through</p> <p>17 Sawtooth Software, the leading developer of</p> <p>18 conjoint design and analysis software.</p> <p>19 Q. And just to give me a sense, what is</p> <p>20 "conjoint analysis"? You said it may not be</p> <p>21 relevant.</p> <p>22 A. It's a representative survey technique</p> <p>23 that asks people to answer discrete choice</p> <p>24 questions in order to understand myriad things,</p> <p>25 depending upon the research objective.</p> <p>5</p>	<p>1 WEIR</p> <p>2 Q. Do you currently hold any licenses or</p> <p>3 certifications in your field?</p> <p>4 A. There's no such thing as a license or</p> <p>5 certification in the field of economics, so I do</p> <p>6 not possess one.</p> <p>7 Q. Where are you currently employed?</p> <p>8 A. I work at Economics and Technology</p> <p>9 Incorporated, which I would propose, for short,</p> <p>10 we refer to as "ETI."</p> <p>11 Q. That seems fair. So, how would you</p> <p>12 describe the business of ETI?</p> <p>13 A. ETI is a consulting firm. We provide</p> <p>14 myriad different types of services to our</p> <p>15 clients, but, largely relating to the fields of</p> <p>16 economics, statistics, data analytics and related</p> <p>17 fields.</p> <p>18 Some of our work is involved in</p> <p>19 litigation or contested proceedings, some of our</p> <p>20 work is involved in public policy, some of our</p> <p>21 work is involved in helping private businesses</p> <p>22 succeed at their own enterprise.</p> <p>23 Q. And are you involved in all of those</p> <p>24 aspects of the business?</p> <p>25 A. Yes.</p> <p>7</p>
<p>1 WEIR</p> <p>2 Q. So, with regard to this case, did you</p> <p>3 perform any conjoint analysis?</p> <p>4 A. I did not.</p> <p>5 Q. Did you consider performing any</p> <p>6 conjoint analysis in this case?</p> <p>7 A. No.</p> <p>8 Q. Other than Northeastern, what other</p> <p>9 education do you have?</p> <p>10 A. The other degree that I hold is a</p> <p>11 Bachelor's degree in Business Economics from the</p> <p>12 College of Wooster. That's Wooster, Ohio,</p> <p>13 W-O-O-S-T-E-R.</p> <p>14 And I have, coming up, 14 and a half</p> <p>15 years of on-the-job experience with economics</p> <p>16 statistics, finance, data analytics and related</p> <p>17 fields.</p> <p>18 Q. With respect to your MBA, what was</p> <p>19 your concentration? Did you have a specific</p> <p>20 concentration?</p> <p>21 A. The primary areas of focus in that</p> <p>22 program included economics, finance, accounting,</p> <p>23 marketing, innovation. There may be some others,</p> <p>24 but, that's what comes to mind as I sit here</p> <p>25 today.</p> <p>6</p>	<p>1 WEIR</p> <p>2 Q. How would you say you divide your</p> <p>3 time? Are you more on the litigation side as</p> <p>4 opposed to public policy and other consulting?</p> <p>5 A. The answer to that question is</p> <p>6 obviously going to depend on the time period that</p> <p>7 you're asking about.</p> <p>8 So, today, 100 percent of my work will</p> <p>9 be involved in the litigation sphere, because</p> <p>10 we're going to be doing this deposition and then</p> <p>11 I'm going home.</p> <p>12 But, if you were to ask about the last</p> <p>13 year or two to three years, I would say about</p> <p>14 50 to 60 percent of my time is engaged in</p> <p>15 litigation and the remainder is involved in the</p> <p>16 other arenas and the management of the business.</p> <p>17 Q. And what is your title at ETI?</p> <p>18 A. I am Vice President.</p> <p>19 Q. And how long have you been employed</p> <p>20 with ETI?</p> <p>21 A. Again, about 14 and a half years.</p> <p>22 Q. And prior to ETI what was your</p> <p>23 employment?</p> <p>24 A. I worked for seven years at Stop &amp;</p> <p>25 Shop Supermarkets.</p> <p>8</p>



<p>1 WEIR</p> <p>2 Q. And what was your role with Stop &amp;</p> <p>3 Shop Supermarket?</p> <p>4 A. I had various roles, but I would</p> <p>5 define them as three different categories.</p> <p>6 One, I served as a cash department</p> <p>7 head, which is the person who manages the</p> <p>8 register area of the store, literally manages</p> <p>9 cash, but also helps with any consumer issues</p> <p>10 that come up at the checkout.</p> <p>11 The second, I served as a grocery</p> <p>12 receiving clerk, where I would bring products</p> <p>13 into the store and deal with the transactions</p> <p>14 with the vendors that brought those products to</p> <p>15 the store.</p> <p>16 And the third is price file</p> <p>17 maintenance head, where I was responsible for the</p> <p>18 maintenance and changing of pricing within the</p> <p>19 store.</p> <p>20 So, at least in Massachusetts and, I</p> <p>21 believe, in other states, there are requirements</p> <p>22 that most grocery products have a shelf tag that</p> <p>23 indicate both a price and unit price, as well as</p> <p>24 that each individual unit of product be stamped</p> <p>25 with its total price.</p> <p>9</p>	<p>1 WEIR</p> <p>2 Q. And after those one or two years, what</p> <p>3 was your next title, if you can?</p> <p>4 A. I was promoted to Senior Economic</p> <p>5 Analyst.</p> <p>6 Q. And what was your role as a senior</p> <p>7 economic analyst?</p> <p>8 A. I would -- it was similar to the role</p> <p>9 as Economic Analyst, but I would be involved in</p> <p>10 more difficult analyses and also marshalling the</p> <p>11 people one rung down, the junior analysts.</p> <p>12 Q. So, you had some supervisory role?</p> <p>13 A. In a limited sense.</p> <p>14 Q. And how long were you a senior</p> <p>15 economic analyst?</p> <p>16 A. Again, that might have been about two</p> <p>17 to two and a half years, subject to check. I</p> <p>18 don't have all those dates memorized.</p> <p>19 Q. And what was your next title with ETI?</p> <p>20 A. I was promoted to the rank of</p> <p>21 Consultant.</p> <p>22 Q. And as a consultant what was your</p> <p>23 role?</p> <p>24 A. As a consultant I began to take on</p> <p>25 project management responsibility. I had client</p> <p>11</p>
<p>1 WEIR</p> <p>2 So, I would monitor that, make changes</p> <p>3 in the computers and have a staff of people that</p> <p>4 would change the prices within the supermarket.</p> <p>5 Q. Okay. So, this was at a specific</p> <p>6 Stop &amp; Shop location that you were employed?</p> <p>7 A. Correct.</p> <p>8 Q. And how did you come to be employed</p> <p>9 with ETI?</p> <p>10 A. I responded to an ad in the Boston</p> <p>11 Globe, maybe the last of the generation that got</p> <p>12 a job through a newspaper.</p> <p>13 Q. What was your initial title with ETI?</p> <p>14 A. Economic Analyst.</p> <p>15 Q. And as an economic analyst, what was</p> <p>16 your function?</p> <p>17 A. I would analyze economic and other</p> <p>18 related data on behalf of the senior staff.</p> <p>19 Q. So, you would take projects from</p> <p>20 senior staff and accomplish whatever analysis</p> <p>21 needed to be done; is that fair?</p> <p>22 A. I don't know whether it's fair or not.</p> <p>23 Q. How long were you an economic analyst?</p> <p>24 A. I probably served in that role for</p> <p>25 between one and two years.</p> <p>10</p>	<p>1 WEIR</p> <p>2 interactions and I continued to conduct economic</p> <p>3 and related analyses on behalf of our clients.</p> <p>4 Q. In respect to all the three roles</p> <p>5 you've discussed so far, were you involved in all</p> <p>6 three of the aspects of the business that we</p> <p>7 discussed earlier, litigation, public policy and</p> <p>8 other consulting work?</p> <p>9 A. Yes.</p> <p>10 Q. And was your time divided similarly to</p> <p>11 how it is now?</p> <p>12 A. Again, if you were to take a period of</p> <p>13 analysis of a year or more, it would be roughly</p> <p>14 the same. If you get to any smaller time period,</p> <p>15 it depends on whatever project happened to be on</p> <p>16 on any given day or week.</p> <p>17 Q. In your role as Economic Analyst and</p> <p>18 Senior Economic Analyst and Consultant, were you</p> <p>19 deposed at any point at that time?</p> <p>20 A. I was not deposed as an economic</p> <p>21 analyst. I don't believe I was deposed as a</p> <p>22 senior economic analyst, although, the promotion</p> <p>23 to Consultant would have been at about the time</p> <p>24 that I began to testify as an expert.</p> <p>25 So, I would say I don't think I was</p> <p>12</p>



<p>1 WEIR</p> <p>2 deposed as a senior analyst, but it could have</p> <p>3 happened once.</p> <p>4 Q. So, you were first disclosed as an</p> <p>5 expert witness sometime around the transition</p> <p>6 between your change from a senior economic</p> <p>7 analyst to a consultant?</p> <p>8 A. I think that's right. And the time</p> <p>9 period would have been approximately 2007-ish,</p> <p>10 but, that would be reflected in the Statement of</p> <p>11 Qualifications that I've submitted in this case.</p> <p>12 Q. And how long were you a consultant</p> <p>13 with ETI?</p> <p>14 A. Again, I believe that would be about</p> <p>15 one to two years.</p> <p>16 Q. And what was your next title?</p> <p>17 A. I was promoted to Senior Consultant.</p> <p>18 These are very creative titles, you can see.</p> <p>19 Q. And what was your role as Senior</p> <p>20 Consultant?</p> <p>21 A. These sort of exist on a continuum,</p> <p>22 so, I continued to increase my client</p> <p>23 interactions, I took on greater responsibility</p> <p>24 for the management of projects, I took on greater</p> <p>25 responsibility for the management of junior staff</p> <p style="text-align: right;">13</p>	<p>1 WEIR</p> <p>2 Q. How many total employees are there</p> <p>3 with ETI?</p> <p>4 A. Presently four.</p> <p>5 Q. And what are the roles of those</p> <p>6 employees?</p> <p>7 A. Dr. Lee L. Selwyn is president of the</p> <p>8 company, there's myself, presently a consultant</p> <p>9 is Andrew J. Kearns, K-E-A-R-N-S, and Emily Stein</p> <p>10 is our accountant and bookkeeper.</p> <p>11 Q. Over the course of your employment</p> <p>12 with ETI, how many employees have there been,</p> <p>13 generally?</p> <p>14 A. I think when I started there were</p> <p>15 approximately 12 employees and at the end of 2004</p> <p>16 and beginning of 2005 there was a landmark</p> <p>17 regulatory decision known as USTA II, U-S-T-A</p> <p>18 Roman two, and that eliminated a chunk of the</p> <p>19 company's business.</p> <p>20 So, there was a major downsizing at</p> <p>21 that point and we've been four, five, three, four</p> <p>22 or five ever since that situation.</p> <p>23 Q. As vice president of the company, what</p> <p>24 are your roles and responsibilities?</p> <p>25 A. So, very similar to the senior</p> <p style="text-align: right;">15</p>
<p>1 WEIR</p> <p>2 working on projects for me and I continued to</p> <p>3 perform my own economic analysis.</p> <p>4 Q. In all these roles were you a salaried</p> <p>5 employee with ETI?</p> <p>6 A. Yes.</p> <p>7 Q. Is this a fixed salary?</p> <p>8 A. Yes.</p> <p>9 Q. Do you have any bonus compensation?</p> <p>10 A. I would occasionally receive -- I</p> <p>11 think it's called a Safe Harbor retirement</p> <p>12 contribution. But, I think that was just because</p> <p>13 people that made more money than me were taking a</p> <p>14 lot of retirement contributions.</p> <p>15 Q. So, there may be some tax benefit</p> <p>16 bonuses, but no performance bonuses?</p> <p>17 A. That's correct.</p> <p>18 Q. How long were you a senior consultant</p> <p>19 with ETI?</p> <p>20 A. Again, that would be about one to two</p> <p>21 years, bringing us into the 2010 and '11</p> <p>22 timeframe, when I was promoted to Vice President.</p> <p>23 Q. And how many vice presidents are there</p> <p>24 with ETI?</p> <p>25 A. Just me.</p> <p style="text-align: right;">14</p>	<p>1 WEIR</p> <p>2 consultant, only I now have managerial</p> <p>3 responsibilities for the enterprise itself, as</p> <p>4 well as managing junior staff, interfacing with</p> <p>5 clients, testifying as an expert and conducting</p> <p>6 economic and related analyses on behalf of our</p> <p>7 clients.</p> <p>8 Q. So, you're still performing a lot of</p> <p>9 the functions you were previously, you said,</p> <p>10 increased managerial roles?</p> <p>11 A. Correct.</p> <p>12 Q. With your time at ETI, approximately</p> <p>13 how many cases have you been disclosed as an</p> <p>14 expert witness?</p> <p>15 A. I would advise you to look at my</p> <p>16 Statement of Qualifications to get a precise</p> <p>17 answer to that. That's not a data point that I</p> <p>18 have memorized. Certainly more than 50. It may</p> <p>19 very well be close to a 100, but, again, I don't</p> <p>20 have the precise number.</p> <p>21 Q. Your Statement of Qualifications</p> <p>22 provided for the last four years, do you have</p> <p>23 just a general sense -- is that representative of</p> <p>24 your time with ETI?</p> <p>25 A. Your assumption that my Statement of</p> <p style="text-align: right;">16</p>



<p>1 WEIR</p> <p>2 Qualifications reflects only the last four years</p> <p>3 is incorrect.</p> <p>4 Q. I see. So, your Statement of</p> <p>5 Qualifications provides all of the cases in which</p> <p>6 you've been disclosed as an expert?</p> <p>7 A. Unless, by inadvertent omission,</p> <p>8 something has been left off, it is complete as of</p> <p>9 the date of the execution of the testimony.</p> <p>10 Q. So, it's your intention that it</p> <p>11 reflects the entirety of your disclosure as an</p> <p>12 expert witness?</p> <p>13 A. Correct.</p> <p>14 Q. Approximately, to your recollection,</p> <p>15 what percentage of those cases in which you have</p> <p>16 been an expert witness have been in class action</p> <p>17 litigation?</p> <p>18 A. Again, I don't have that number</p> <p>19 memorized.</p> <p>20 Q. What types of cases have you been</p> <p>21 disclosed as an expert in?</p> <p>22 A. I've been disclosed in class action</p> <p>23 cases, I've been disclosed in other types of</p> <p>24 litigations that are not class actions, I've been</p> <p>25 disclosed in various regulatory proceedings or</p> <p>17</p>	<p>1 WEIR</p> <p>2 A. Not off the top of my head.</p> <p>3 Q. Have you been disclosed as an expert</p> <p>4 with respect to consumer electronic products?</p> <p>5 A. Yes.</p> <p>6 Q. Do you have a sense of how many times?</p> <p>7 A. More than one, but, again, I don't</p> <p>8 have that statistic memorized.</p> <p>9 Q. Have you previously been retained as</p> <p>10 an expert by Bursor &amp; Fisher?</p> <p>11 A. Yes.</p> <p>12 Q. Do you have an estimate of how many</p> <p>13 times?</p> <p>14 A. Not off the top of my head.</p> <p>15 Q. Would it surprise you if it's more</p> <p>16 than 25?</p> <p>17 A. I don't know that I would register an</p> <p>18 emotion to that statistic one way or the other.</p> <p>19 Q. Would you disagree with me if I said</p> <p>20 it's more than 25 times?</p> <p>21 A. I would say I would want to check my</p> <p>22 record of prior testimony.</p> <p>23 Q. With respect to your work for Bursor &amp;</p> <p>24 Fisher, have all of those cases involved class</p> <p>25 action litigation?</p> <p>19</p>
<p>1 WEIR</p> <p>2 regulatory disputes, I've been involved in</p> <p>3 proceedings -- I guess at some levels they're</p> <p>4 adversarial, but they're not Side A vs. Side B,</p> <p>5 if you will. So, for example, the analysis and</p> <p>6 the evaluation of a proposed merger transaction.</p> <p>7 Q. With respect to the class action</p> <p>8 litigation that you have been involved in, how</p> <p>9 often would you say you are disclosed by the</p> <p>10 plaintiffs in those cases?</p> <p>11 A. I'm not sure how to answer that. I</p> <p>12 sometimes work for plaintiffs, I sometimes work</p> <p>13 for defendants.</p> <p>14 Q. Do you have a general sense of the</p> <p>15 breakdown between the two of those?</p> <p>16 A. Not off the top of my head. Again,</p> <p>17 that's not a statistic that I keep memorized.</p> <p>18 Q. You don't have an estimate?</p> <p>19 A. I do not.</p> <p>20 Q. Previous to this case have you been</p> <p>21 disclosed in class action litigation involving</p> <p>22 consumer products?</p> <p>23 A. Yes.</p> <p>24 Q. Do you have an estimate of how many</p> <p>25 times?</p> <p>18</p>	<p>1 WEIR</p> <p>2 A. No.</p> <p>3 Q. What types of cases have they</p> <p>4 involved?</p> <p>5 A. I remember one engagement that related</p> <p>6 to a FOIA request.</p> <p>7 Q. Was that a FOIA request being made by</p> <p>8 Bursor &amp; Fisher?</p> <p>9 A. Correct.</p> <p>10 Q. And to whom was that being made?</p> <p>11 A. The FOIA request?</p> <p>12 Q. Yes.</p> <p>13 A. I believe the request was levied of</p> <p>14 the Federal Communications Commission.</p> <p>15 Q. And was that with respect to</p> <p>16 anticipated litigation, to your knowledge?</p> <p>17 A. I think it related to the ability to</p> <p>18 evaluate the proprietary of the then-proposed</p> <p>19 AT&amp;T and T-Mobile merger.</p> <p>20 Q. Other than that case involving a FOIA</p> <p>21 request, what other cases with Bursor &amp; Fisher</p> <p>22 were you involved in that were not class action</p> <p>23 litigation?</p> <p>24 A. Again, without reviewing the Statement</p> <p>25 of Qualifications, that's the one that comes to</p> <p>20</p>





<p>1 WEIR</p> <p>2 mind, but there may be others.</p> <p>3 Q. With respect to your work for Bursor &amp;</p> <p>4 Fisher, other than the FOIA request you</p> <p>5 mentioned, have the cases been on behalf of class</p> <p>6 action plaintiffs?</p> <p>7 A. would you just ask the question one</p> <p>8 more time, please.</p> <p>9 Q. Your work for Bursor &amp; Fisher, is that</p> <p>10 generally on the plaintiff's side?</p> <p>11 A. I feel comfortable saying it's</p> <p>12 generally on the plaintiff's side.</p> <p>13 Q. Have you been disclosed as an expert</p> <p>14 by Bursor &amp; Fisher on the side of the defense?</p> <p>15 A. I think on at least one occasion.</p> <p>16 Q. And what was that occasion?</p> <p>17 A. The case was in re cellphone</p> <p>18 termination fee cases.</p> <p>19 Q. And what was the party in that case?</p> <p>20 A. The case involved a class of</p> <p>21 plaintiffs and the company Sprint.</p> <p>22 Q. And in that case you were being</p> <p>23 disclosed as an expert on behalf of Sprint?</p> <p>24 A. In that case the class successfully</p> <p>25 sued Sprint and then Sprint countersued its own</p> <p style="text-align: right;">21</p>	<p>1 WEIR</p> <p>2 So, that's an engagement that, if I</p> <p>3 wasn't paying attention to the news, I would not</p> <p>4 have known was over.</p> <p>5 So, there's a lot of ins and outs in</p> <p>6 terms of understanding that and I don't</p> <p>7 necessarily profess to have all of that</p> <p>8 information, as I sit here today.</p> <p>9 Q. In the past year, how many times have</p> <p>10 you been deposed as an expert witness?</p> <p>11 A. Again, that's knowable from the</p> <p>12 Statement of Qualifications, but I don't know the</p> <p>13 number off the top of my head.</p> <p>14 Q. Prior to this case have you testified</p> <p>15 as an expert witness in a case involving full</p> <p>16 compensatory damages for breach of warranty</p> <p>17 claim?</p> <p>18 A. So, again, I have to profess that I'm</p> <p>19 not a lawyer. So, what I can tell you is, I've</p> <p>20 been involved in several cases that involve what</p> <p>21 I would describe as full compensatory damages.</p> <p>22 what the precise nature of the legal claims were,</p> <p>23 I can't speak so that.</p> <p>24 Q. Were those cases involving consumer</p> <p>25 products?</p> <p style="text-align: right;">23</p>
<p>1 WEIR</p> <p>2 customers, which struck me as remarkable. So, I</p> <p>3 was brought in at the stage of the case where I</p> <p>4 was representing the counterclaim defendants.</p> <p>5 Q. I see. So, you were being disclosed</p> <p>6 on behalf of the class, but in a defense capacity</p> <p>7 based on the state of that litigation?</p> <p>8 A. Correct.</p> <p>9 Q. Other than the case that we're</p> <p>10 involved in here, are you currently under</p> <p>11 retention by Bursor &amp; Fisher in any other</p> <p>12 litigation?</p> <p>13 A. Yes.</p> <p>14 Q. How many cases?</p> <p>15 A. I don't know off the top of my head.</p> <p>16 Q. You don't know how many that you are</p> <p>17 currently involved in?</p> <p>18 A. Part of the problem is understanding</p> <p>19 the state of play of cases.</p> <p>20 So, just as an example, I gave a</p> <p>21 deposition just three or four weeks ago in a case</p> <p>22 involving Bursor &amp; Fisher and I happened to have</p> <p>23 heard by the trade press that, for reasons</p> <p>24 unrelated to damages, that case was terminated by</p> <p>25 the judge.</p> <p style="text-align: right;">22</p>	<p>1 WEIR</p> <p>2 A. Yes.</p> <p>3 Q. Other than this case in the past year,</p> <p>4 have you had any case involving consumer products</p> <p>5 where you opined it to full compensatory damages?</p> <p>6 A. And when we say "the past year," we're</p> <p>7 talking about the past 12 months, not the past</p> <p>8 week or two?</p> <p>9 Q. Yes. The past 12 months.</p> <p>10 A. I believe the answer to that is, yes,</p> <p>11 but I would need to check my Statement of</p> <p>12 Qualifications.</p> <p>13 Q. You say, "Yes." Do you recall what</p> <p>14 those cases were?</p> <p>15 A. I can think of one case that I believe</p> <p>16 was within the past 12 months. Although, again,</p> <p>17 I don't memorize those dates, so I could be</p> <p>18 mistaken.</p> <p>19 But, I believe one case, for example,</p> <p>20 involved the sale of what are known as</p> <p>21 homeopathic remedies.</p> <p>22 And homeopathy is a practice by which</p> <p>23 a remedy is made by taking something ridiculously</p> <p>24 small, like one part per hundred million of not a</p> <p>25 remedy, but actually something that would cause</p> <p style="text-align: right;">24</p>



<p>1 WEIR</p> <p>2 the symptoms that somebody is suffering from, and</p> <p>3 putting that into a sugar water solution and then</p> <p>4 either giving the solution or a pill derived</p> <p>5 therefrom to consumers.</p> <p>6 And if you ask a scientist, at least,</p> <p>7 they'll tell you that that practice is hogwash.</p> <p>8 And so, I sponsored testimony</p> <p>9 suggesting that, if that in were, in fact, the</p> <p>10 case, a full refund would be the correct remedy</p> <p>11 in that case.</p> <p>12 <b>Q. So, in that case your testimony</b></p> <p>13 <b>regarding full compensatory damages was based on</b></p> <p>14 <b>the assumption that the products were, in fact,</b></p> <p>15 <b>ineffective?</b></p> <p>16 A. I don't know if I would state it quite</p> <p>17 like that. What I would say is that plaintiffs</p> <p>18 alleged that the products were ineffective and</p> <p>19 valueless.</p> <p>20 And the first step in any damages</p> <p>21 calculation is to assume, depends on which way</p> <p>22 you want to phrase it, either that plaintiffs</p> <p>23 established their theory of liability or that</p> <p>24 defendants are held liable for the alleged</p> <p>25 behavior.</p> <p>25</p>	<p>1 WEIR</p> <p>2 A. That's a good question. That I don't</p> <p>3 know off the top of my head. I would have to</p> <p>4 refresh my recollection from my Statement of</p> <p>5 Qualifications.</p> <p>6 <b>Q. We may do that in a bit. In your</b></p> <p>7 <b>career how many times would you estimate you have</b></p> <p>8 <b>testified at trial?</b></p> <p>9 A. I believe I've given testimony in</p> <p>10 front of a jury maybe three or four times.</p> <p>11 I've given testimony in front of a</p> <p>12 judge, whether or not you call that a trial or</p> <p>13 not, maybe another one or two or three times.</p> <p>14 I've literally been at the airport to</p> <p>15 go testify at trial many times and been told that</p> <p>16 the parties have settled on the eve of the</p> <p>17 litigation.</p> <p>18 <b>Q. And you prepped for trial a number of</b></p> <p>19 <b>times, but not necessarily testified?</b></p> <p>20 A. Correct.</p> <p>21 <b>Q. In what types of cases have you</b></p> <p>22 <b>testified at trial?</b></p> <p>23 A. Two such cases involved the sale of a</p> <p>24 product that was alleged to be a natural hair</p> <p>25 regrowth suite of products and it turned out to</p> <p>27</p>
<p>1 WEIR</p> <p>2 <b>Q. I see. So, you based your analysis on</b></p> <p>3 <b>the allegations in that matter?</b></p> <p>4 A. The reference manual on scientific</p> <p>5 evidence as it relates to the quantification of</p> <p>6 damages is crystal clear on that being the very</p> <p>7 first step that any damages quantifier should</p> <p>8 take in a contested proceeding such as this.</p> <p>9 <b>Q. I see. So, in that case your</b></p> <p>10 <b>understanding was that, for liability to attach</b></p> <p>11 <b>to the defendants, it was necessary that the</b></p> <p>12 <b>products be entirely ineffective?</b></p> <p>13 A. I was not testifying as to the nature</p> <p>14 of liability, so I was not offering an opinion</p> <p>15 about what would or would not satisfy a finding</p> <p>16 of liability in the eyes of the court, which is</p> <p>17 the same situation in which I find myself here in</p> <p>18 this incident litigation.</p> <p>19 <b>Q. Are you aware of the dispensation of</b></p> <p>20 <b>the homeopathic remedy case?</b></p> <p>21 A. I've testified in a couple of them. I</p> <p>22 believe one settled, I believe one or two of the</p> <p>23 others are still pending.</p> <p>24 <b>Q. In the past year have you testified at</b></p> <p>25 <b>trial?</b></p> <p>26</p>	<p>1 WEIR</p> <p>2 be nothing more than common Minoxidil. And so, I</p> <p>3 gave testimony as to the damages in that case.</p> <p>4 <b>Q. And so, that was a class action case?</b></p> <p>5 A. It was.</p> <p>6 <b>Q. You testified on behalf of the class?</b></p> <p>7 A. Correct.</p> <p>8 <b>Q. Was that case on behalf of Bursor &amp;</b></p> <p>9 <b>Fisher?</b></p> <p>10 A. It was not.</p> <p>11 <b>Q. Was a verdict rendered in that case?</b></p> <p>12 A. There was a verdict rendered in both</p> <p>13 of the trials.</p> <p>14 <b>Q. Both of the trials involving the</b></p> <p>15 <b>natural hair growth products?</b></p> <p>16 A. Correct.</p> <p>17 <b>Q. And what was the verdict?</b></p> <p>18 A. The jury adopted my damages testimony</p> <p>19 to the penny.</p> <p>20 <b>Q. Did either of those cases involve full</b></p> <p>21 <b>compensatory damages?</b></p> <p>22 A. They did.</p> <p>23 <b>Q. Other than those two cases, what other</b></p> <p>24 <b>cases have you testified at trial?</b></p> <p>25 A. I testified at trial in a wrongful</p> <p>28</p>



<p>1 WEIR</p> <p>2 death case where I provided an estimate of the</p> <p>3 lost wages potentially due to the estate of the</p> <p>4 deceased.</p> <p>5 Q. So, that was not a class action case?</p> <p>6 A. It was not a class action.</p> <p>7 Q. What other cases have you testified at</p> <p>8 trial?</p> <p>9 A. Again, without the ability to refresh</p> <p>10 my recollection from the documents, those are the</p> <p>11 instances that I recall testifying in front of a</p> <p>12 jury.</p> <p>13 As I mentioned before, there have been</p> <p>14 a couple of times that I've been before a judge.</p> <p>15 In one case that comes to mind it was in the</p> <p>16 Seventh Circuit, I was before Judge Kennelly.</p> <p>17 I was brought in to testify as to</p> <p>18 whether the attorney's fees being sought in a</p> <p>19 settlement were fairly characterized as being</p> <p>20 market-based rates.</p> <p>21 And so, I conducted a survey of</p> <p>22 attorney's fees, looked at firm reputation,</p> <p>23 educational background, years of experience and</p> <p>24 offered testimony that related to whether the</p> <p>25 rates that were being requested were, in fact,</p> <p>29</p>	<p>1 WEIR</p> <p>2 Q. Do you recall who contacted you with</p> <p>3 respect to this case?</p> <p>4 A. I can't state with certainty, but it</p> <p>5 may have Yitz Kopel.</p> <p>6 Q. Did you previously know Yitz Kopel?</p> <p>7 A. Yes.</p> <p>8 Q. Was Yitz Kopel counsel on any cases in</p> <p>9 which you had previously been disclosed as an</p> <p>10 expert?</p> <p>11 A. That's possible, but I don't really</p> <p>12 think about, you know, whose name appears on the</p> <p>13 case caption, so, I don't know that I can state</p> <p>14 with certainty.</p> <p>15 Q. Had you previously worked with Yitz</p> <p>16 Kopel with respect to cases on which you were</p> <p>17 disclosed as an expert?</p> <p>18 A. Yes.</p> <p>19 Q. Do you have an approximate sense of</p> <p>20 how many?</p> <p>21 A. Maybe one or two, to the best of my</p> <p>22 recollection.</p> <p>23 Q. And those one or two cases,</p> <p>24 approximately, when was that?</p> <p>25 A. I would say it was probably within the</p> <p>31</p>
<p>1 WEIR</p> <p>2 market-based.</p> <p>3 Q. Do you recall the ultimate finding in</p> <p>4 that matter?</p> <p>5 A. To be honest, I don't.</p> <p>6 Q. With respect to your testimony in</p> <p>7 front of -- non-jury, in front of judges, did any</p> <p>8 of those involve class action litigation?</p> <p>9 A. It's possible. But, again, without</p> <p>10 the benefit of my Statement of Qualifications, I</p> <p>11 can't precisely remember.</p> <p>12 Q. With respect to this case that we're</p> <p>13 sitting here today, when were you retained?</p> <p>14 A. I think it would have been, to the</p> <p>15 best of my recollection, late 2016 or early 2017,</p> <p>16 but that's not a date that I memorized in advance</p> <p>17 of the deposition.</p> <p>18 Q. And how were you initially contacted</p> <p>19 with respect to this case?</p> <p>20 A. I don't have a precise memory. The</p> <p>21 typical experience in almost any of my cases is</p> <p>22 that I receive a phone call and somebody says,</p> <p>23 "Hey, I have a case, are you willing to talk to</p> <p>24 me about it," and I run a conflict check and then</p> <p>25 I have a conversation about the case.</p> <p>30</p>	<p>1 WEIR</p> <p>2 one or two years prior to my engagement on the</p> <p>3 Bell &amp; Howell matter.</p> <p>4 Q. And the one or two cases, were those</p> <p>5 class action litigation?</p> <p>6 A. To the best of my recollection, yes.</p> <p>7 Q. Did either of those cases involve</p> <p>8 consumer products, to your recollection?</p> <p>9 A. The one that I can think of</p> <p>10 definitively did involve consumer products.</p> <p>11 Q. And which case was that?</p> <p>12 A. The Ebin vs. Kangadis cases.</p> <p>13 Q. And what did those cases involve?</p> <p>14 A. The deceptive sale of a product known</p> <p>15 as pomace oil that was being sold as olive oil.</p> <p>16 Q. And you worked with Yitz Kopel on both</p> <p>17 of those cases. Are those cases currently</p> <p>18 pending?</p> <p>19 A. I believe all of those cases have been</p> <p>20 resolved.</p> <p>21 Q. And in both of those cases you</p> <p>22 submitted an expert report?</p> <p>23 A. To the best of my recollection, yes.</p> <p>24 Q. Were you deposed in either of those</p> <p>25 cases?</p> <p>32</p>





<p>1 <b>WEIR</b></p> <p>2 A. In at least one of them, yes.</p> <p>3 Again, I would advise the reader of</p> <p>4 the transcript to consult my Statement of</p> <p>5 Qualifications for definitive answers on these</p> <p>6 dates and cases rather than this memory quiz, but</p> <p>7 you can proceed as you will.</p> <p>8 <b>Q. Fair enough. Prior to your retention</b></p> <p>9 <b>in this matter were you familiar with Bell &amp;</b></p> <p>10 <b>Howell?</b></p> <p>11 A. I had a vague recollection of them as</p> <p>12 formerly having been producers of optical</p> <p>13 equipment, like movie projectors.</p> <p>14 <b>Q. So, you weren't familiar with Bell &amp;</b></p> <p>15 <b>Howell as a purveyor of consumer products?</b></p> <p>16 A. Well, I would view movie projectors</p> <p>17 that they sold as being consumer products, but I</p> <p>18 was unaware, for example, of the pest repeller</p> <p>19 products as being sold by Bell &amp; Howell.</p> <p>20 <b>Q. Prior to your retention in this case,</b></p> <p>21 <b>did you have any experience with ultrasonic pest</b></p> <p>22 <b>repellers?</b></p> <p>23 A. Not personally. No.</p> <p>24 <b>Q. Prior to your retention in this case,</b></p> <p>25 <b>were you familiar with Joanne Hart and/or Sandra</b></p> <p style="text-align: right;">33</p>	<p>1 <b>WEIR</b></p> <p>2 anything like that.</p> <p>3 <b>Q. Approximately how many hours would you</b></p> <p>4 <b>say you billed them?</b></p> <p>5 A. I can probably comfortably say dozens,</p> <p>6 but I did not consult my billing records in</p> <p>7 anticipation of the deposition. So, again, the</p> <p>8 answer to your question is knowable, but I don't</p> <p>9 know it as I sit here today.</p> <p>10 <b>Q. Other than yourself, did anyone else</b></p> <p>11 <b>with ETI assist in your work on the case?</b></p> <p>12 A. I know that Andrew Kearns, who we</p> <p>13 discussed earlier today, has assisted with some</p> <p>14 of the data analytics.</p> <p>15 To the best of my knowledge, he's the</p> <p>16 only other person that has provided what I would</p> <p>17 describe as substantive work on the case.</p> <p>18 <b>Q. And when you say he performed data</b></p> <p>19 <b>analytics, what kind of work did Andrew do on</b></p> <p>20 <b>this case?</b></p> <p>21 A. I think he assisted in summarizing the</p> <p>22 sales data in conducting, under my direction, the</p> <p>23 state-by-state apportionments, that kind of, I</p> <p>24 would describe it as, spreadsheeting exercises.</p> <p>25 <b>Q. So, his work on this case would have</b></p> <p style="text-align: right;">35</p>
<p>1 <b>WEIR</b></p> <p>2 <b>Bueno?</b></p> <p>3 A. Not to my knowledge. I always give</p> <p>4 the caveat that you never know who you're talking</p> <p>5 to when you're sitting on an airplane, but, I</p> <p>6 don't know them.</p> <p>7 <b>Q. So, to this date, have you spoken with</b></p> <p>8 <b>either Joanne Hart or Sandra Bueno?</b></p> <p>9 A. Again, not to the best of my</p> <p>10 knowledge.</p> <p>11 <b>Q. With respect to this case you have not</b></p> <p>12 <b>spoken with them?</b></p> <p>13 A. Correct.</p> <p>14 <b>Q. And with respect to this case, what</b></p> <p>15 <b>was your compensation arrangement?</b></p> <p>16 A. Economics and technology as being</p> <p>17 compensated at the rate of \$600 an hour for my</p> <p>18 time, however that time is spent. And I believe</p> <p>19 that --</p> <p>20 well, other members of my firm, to the</p> <p>21 extent that they work on the case, are</p> <p>22 compensated at other rates. But, that's the sum</p> <p>23 total of the arrangement.</p> <p>24 we get paid for our time. There are</p> <p>25 no contingency fees or performance bonuses or</p> <p style="text-align: right;">34</p>	<p>1 <b>WEIR</b></p> <p>2 <b>been at your direction?</b></p> <p>3 A. Yes.</p> <p>4 <b>Q. When you were first retained by Bursor</b></p> <p>5 <b>&amp; Fisher, what was your understanding of your</b></p> <p>6 <b>assignment in this matter?</b></p> <p>7 A. I was asked at the outset just to</p> <p>8 understand the nature of the case, so, to review</p> <p>9 the Complaint, do some background research as to</p> <p>10 the products and then to make a determination</p> <p>11 about whether or not --</p> <p>12 well, within the framework of the</p> <p>13 allegations, to determine what type of damages</p> <p>14 might be at issue in the case.</p> <p>15 Once having made that determination,</p> <p>16 determining whether or not it would be possible</p> <p>17 to determine those damages using class-wide</p> <p>18 common evidence and, if I was able to make that</p> <p>19 determination in the affirmative, to then set</p> <p>20 forth an estimate of those damages.</p> <p>21 <b>Q. When you say you were asked to do</b></p> <p>22 <b>background research on the products, what kind of</b></p> <p>23 <b>background research did you do?</b></p> <p>24 A. The common practice for me would be to</p> <p>25 check out the defendant's website, if I know</p> <p style="text-align: right;">36</p>



<p>1 WEIR</p> <p>2 anything about the retailers of the product, to</p> <p>3 investigate them to the extent I don't already</p> <p>4 know who they are.</p> <p>5 Just to do some, you know, some</p> <p>6 research to understand the nature of the product</p> <p>7 and what's at issue in the litigation.</p> <p>8 <b>Q. So, in this case what kind of</b></p> <p>9 <b>background research did you do?</b></p> <p>10 A. Again, I would have looked, for</p> <p>11 example, at any available information online</p> <p>12 about Bell &amp; Howell, the pest repellents.</p> <p>13 As I became aware of some of the major</p> <p>14 retailers, I didn't really need to look up</p> <p>15 Walmart. I've researched them many times in the</p> <p>16 past.</p> <p>17 But, there were some other retailers</p> <p>18 that I just checked out their websites just to</p> <p>19 understand what the nature of the retail</p> <p>20 relationship was like.</p> <p>21 <b>Q. When you say, "the nature of the</b></p> <p>22 <b>retail relationship," what do you mean by that?</b></p> <p>23 A. Who the retailer is, do they sell</p> <p>24 online, in a store, via catalog, could I see the</p> <p>25 Bell &amp; Howell products for sale, et cetera.</p> <p>37</p>	<p>1 WEIR</p> <p>2 case. And then, you know, formulating my</p> <p>3 understanding.</p> <p>4 So, at the outset of the case, for</p> <p>5 example, when I found out that Walmart was a</p> <p>6 retailer, I know from past experience that</p> <p>7 Walmart can provide retail sales data and will</p> <p>8 provide retail sales data subject to protective</p> <p>9 order in the course of a litigation.</p> <p>10 So, that helps me frame my</p> <p>11 understanding that that type of data can and will</p> <p>12 be available in a particular case.</p> <p>13 <b>Q. So, after you performed your</b></p> <p>14 <b>background research, you stated that you did an</b></p> <p>15 <b>analysis of the types of damages that would be</b></p> <p>16 <b>available; is that correct?</b></p> <p>17 MR. ARISOHN: Object to form.</p> <p>18 Misstates the prior testimony.</p> <p>19 THE WITNESS: I think what I would</p> <p>20 have been thinking about throughout all of</p> <p>21 this is what type of damages are at issue in</p> <p>22 the case and I would have made that</p> <p>23 determination based upon a review of the</p> <p>24 Complaint and based upon my discussions with</p> <p>25 counsel.</p> <p>39</p>
<p>1 WEIR</p> <p>2 <b>Q. Would you maintain any notes or draft</b></p> <p>3 <b>any documents with respect to that research?</b></p> <p>4 A. I'm not a note taker. My seventh</p> <p>5 grade history professor would comment on that.</p> <p>6 If anything that I found was particularly</p> <p>7 salient, it would have found its way into my</p> <p>8 Declaration.</p> <p>9 But, typically what I'm doing is kind</p> <p>10 of confirming my expectation about the nature of</p> <p>11 the retail market, which is that, there are many</p> <p>12 retailers, there's competition that Bell &amp; Howell</p> <p>13 either -- well, that Bell &amp; Howell was not a</p> <p>14 primary retailer in and of themselves.</p> <p>15 Again, I'm just trying to get some</p> <p>16 background; nothing, you know, overly serious</p> <p>17 about the case.</p> <p>18 <b>Q. So, to the extent that there is</b></p> <p>19 <b>nothing in your Declaration reflecting that</b></p> <p>20 <b>research, you would say that that was not</b></p> <p>21 <b>particularly salient? Is that your testimony?</b></p> <p>22 A. I guess I would say that it just -- to</p> <p>23 the extent it factored into anything, it was into</p> <p>24 my understanding of whether or not I felt damages</p> <p>25 could be calculated on a class-wide basis in this</p> <p>38</p>	<p>1 WEIR</p> <p>2 Because, the type of damages that are</p> <p>3 going to be available stem directly from the</p> <p>4 nature of Plaintiffs' theory of liability.</p> <p>5 My background research related, I</p> <p>6 think, maybe more to the next step, which</p> <p>7 is, is it likely that we would be able to</p> <p>8 put together a framework and analysis that</p> <p>9 would demonstrate what those damages are and</p> <p>10 how they can be calculated.</p> <p>11 <b>Q. So, the nature of damages, your</b></p> <p>12 <b>understanding of the nature of damages was based</b></p> <p>13 <b>on your review of the Complaint and your</b></p> <p>14 <b>discussions with counsel?</b></p> <p>15 A. And my 14 years of experience in</p> <p>16 understanding this particular type of litigation</p> <p>17 scenario.</p> <p>18 <b>Q. When you say, "this type of litigation</b></p> <p>19 <b>scenario," what are you referring to?</b></p> <p>20 A. Talking about a product that has one</p> <p>21 central professed value and where the litigation</p> <p>22 is challenging the very existence of any of that</p> <p>23 value.</p> <p>24 <b>Q. So, we discussed your understanding of</b></p> <p>25 <b>the nature of your assignment. Following your</b></p> <p>40</p>



<p>1 WEIR</p> <p>2 retention and your background research, what did</p> <p>3 you do next?</p> <p>4 A. Just so that the record is clear,</p> <p>5 you're characterizing these things as if they are</p> <p>6 linear in a timeline and I think there would be</p> <p>7 some overlap to all of these processes.</p> <p>8 But, subject to that caveat, I was</p> <p>9 retained, I did some background research, I came</p> <p>10 to the conclusion that, based upon Plaintiffs'</p> <p>11 stated theory of liability, full compensatory</p> <p>12 damages would be the correct measure of economic</p> <p>13 damages in the case.</p> <p>14 Q. Let me stop you there.</p> <p>15 MR. ARISOHN: Were you done with your</p> <p>16 answer?</p> <p>17 Q. Sorry. I know that I asked sort of a</p> <p>18 lengthy, compound question, so I will break it up</p> <p>19 for purposes --</p> <p>20 A. I don't mind if you break it up, just</p> <p>21 so long as the record reflects that I was not</p> <p>22 finished with my reply.</p> <p>23 Q. I'll let you finish and then I can go</p> <p>24 back. Go ahead.</p> <p>25 THE WITNESS: I'm sorry. Would you</p> <p>41</p>	<p>1 WEIR</p> <p>2 Q. And the background nature into the</p> <p>3 nature of the products, what was that research?</p> <p>4 A. Again, that involved some of the</p> <p>5 online research that we've already discussed, as</p> <p>6 well as a review of, I think, some of the product</p> <p>7 labels that had been produced in litigation and,</p> <p>8 perhaps, other document production.</p> <p>9 But, we're going back almost a year</p> <p>10 now, so, I don't remember exactly everything that</p> <p>11 I've looked at at that preliminary stage.</p> <p>12 Q. Did you review any scientific studies</p> <p>13 with respect to ultrasound pest repellent?</p> <p>14 A. By that do you mean their</p> <p>15 effectiveness?</p> <p>16 Q. Yes.</p> <p>17 A. Since it's beyond the scope of my</p> <p>18 retention to evaluate the pest repeller's</p> <p>19 effectiveness, I did not look at any such</p> <p>20 studies.</p> <p>21 Q. You quantified my question. Did you</p> <p>22 review any scientific studies with respect to</p> <p>23 other aspects of the ultrasound pest repellents?</p> <p>24 A. Well, it depends on how you take that</p> <p>25 question.</p> <p>43</p>
<p>1 WEIR</p> <p>2 mind reading back the question and the</p> <p>3 fractional answer?</p> <p>4 (Record read.)</p> <p>5 THE WITNESS: Okay. So, as the record</p> <p>6 will reflect, I had given consideration to</p> <p>7 the nature of the type of damages, made a</p> <p>8 determination that full compensatory damages</p> <p>9 would be a legitimate model of economic harm</p> <p>10 for this case.</p> <p>11 I gave consideration to statutory</p> <p>12 remedies and then gave consideration to the</p> <p>13 type of data that I would want in order to</p> <p>14 make a determination of what the full</p> <p>15 compensatory damages would be in this case</p> <p>16 under any of the class or subclass scenarios</p> <p>17 being proposed by the Plaintiff.</p> <p>18 Q. When you say that you determined that</p> <p>19 full compensatory damages would be the proper</p> <p>20 measure, what analysis did you do to come to that</p> <p>21 conclusion?</p> <p>22 A. Again, it was based on a review of the</p> <p>23 Plaintiffs' complaints, my discussion with</p> <p>24 counsel and the background research into the</p> <p>25 nature of the products.</p> <p>42</p>	<p>1 WEIR</p> <p>2 So, for example, the work that I did I</p> <p>3 believe is a scientific study relating to these</p> <p>4 pest repellents, but it relates to the economics</p> <p>5 of the pest repellents, not, per say, to their</p> <p>6 efficaciousness.</p> <p>7 Q. Did you review any scientific studies</p> <p>8 with respect to the economic questions that you</p> <p>9 just raised?</p> <p>10 A. Again, I performed and reviewed such</p> <p>11 studies.</p> <p>12 Q. Other than your own study.</p> <p>13 A. I would have to look back at the</p> <p>14 documents reviewed in order to answer that</p> <p>15 question. I don't recall as I sit here today.</p> <p>16 (Defendant's Exhibit No. 1, Statement</p> <p>17 of Qualifications, marked for identification</p> <p>18 as of this date.)</p> <p>19 Q. Can you review Exhibit 1?</p> <p>20 A. Subject to check, this appears to be a</p> <p>21 copy of my October 31st, 2017 Declaration</p> <p>22 submitted in this matter.</p> <p>23 Q. So, to your understanding, this is</p> <p>24 your report of your expert determination in this</p> <p>25 matter?</p> <p>44</p>



<p>1 <b>WEIR</b></p> <p>2 A. Again, subject to check, this is a</p> <p>3 copy of the Declaration that I submitted with</p> <p>4 some of my findings as of October 31st, 2017.</p> <p>5 Q. Did you want to check just to make</p> <p>6 sure it's complete?</p> <p>7 A. The check that I would do would be to</p> <p>8 go back to my computer and hold it side by side.</p> <p>9 So, I'm willing to accept your</p> <p>10 representation that it's okay, but, it wouldn't</p> <p>11 be the first time there had been a clerical error</p> <p>12 involving a missing page or something that didn't</p> <p>13 photocopy correctly.</p> <p>14 So, I apologize that I'm overly</p> <p>15 focused on semantics, but, it appears to be a</p> <p>16 copy, subject to check, of my Declaration</p> <p>17 submitted as of October 31st, 2017.</p> <p>18 Q. Fair enough. So, to your</p> <p>19 understanding this document includes all the</p> <p>20 opinions that you have rendered in this matter?</p> <p>21 A. Almost certainly not.</p> <p>22 Q. So, there are opinions that you are</p> <p>23 rendering on which you would testify that are not</p> <p>24 included in this report?</p> <p>25 A. Well, for example, I submitted a</p> <p style="text-align: right;">45</p>	<p>1 <b>WEIR</b></p> <p>2 And so, whatever opinions I may need</p> <p>3 to give in response to your question, I would</p> <p>4 give them and have been so requested.</p> <p>5 Q. If you can turn to Exhibit 1.</p> <p>6 A. By which you mean Exhibit 1, Statement</p> <p>7 of Qualifications to deposition Exhibit 1?</p> <p>8 Q. Yes. Exhibit 1 to Exhibit 1, if you</p> <p>9 look at page 2 of that. And you can take a</p> <p>10 second to review it.</p> <p>11 would that refresh your recollection</p> <p>12 as to the number of cases in which you have been</p> <p>13 retained by Bursor &amp; Fisher?</p> <p>14 A. Page 2?</p> <p>15 Q. Page 2 and the following pages.</p> <p>16 Correct. Oh. I apologize. It would begin on</p> <p>17 page 3.</p> <p>18 MR. ARISOHN: For clarification --</p> <p>19 Q. For clarification, page 2, I believe,</p> <p>20 begins publications, page 3 of the document would</p> <p>21 then list matters of that.</p> <p>22 would that refresh your recollection</p> <p>23 as to how many times you have been retained by</p> <p>24 Bursor &amp; Fisher?</p> <p>25 A. I can tally the number of times that I</p> <p style="text-align: right;">47</p>
<p>1 <b>WEIR</b></p> <p>2 report prior to this and, although they're</p> <p>3 similar, there may be differences.</p> <p>4 In addition, I'm sitting for</p> <p>5 deposition today and you're going to ask</p> <p>6 questions and I'm going to offer opinions in</p> <p>7 response to that. So, I would anticipate giving</p> <p>8 potentially hours of additional opinions.</p> <p>9 In addition, I know that there has</p> <p>10 been new data that has become available in this</p> <p>11 case. And so, if we talk about that new data, I</p> <p>12 may offer opinions as it relates to that</p> <p>13 additional data.</p> <p>14 Q. So, this report reflects the scope of</p> <p>15 opinions that you were requested to provide by</p> <p>16 counsel in this matter?</p> <p>17 A. I don't know what that means.</p> <p>18 Q. Are there any opinions that you were</p> <p>19 requested to provide by counsel that are not in</p> <p>20 this report?</p> <p>21 A. Well, I don't know that there were</p> <p>22 specific opinions that I've been asked to provide</p> <p>23 by counsel, but they've asked me to appear here</p> <p>24 today and answer your questions and to do so</p> <p>25 truthfully and honestly.</p> <p style="text-align: right;">46</p>	<p>1 <b>WEIR</b></p> <p>2 have appeared on behalf of Bursor &amp; Fisher from</p> <p>3 this list; it will take me a few moments. I'm</p> <p>4 happy to do so if you would like.</p> <p>5 Q. We will be taking a break, I think, in</p> <p>6 five minutes or so, so, maybe you we can do it</p> <p>7 over the break.</p> <p>8 But, this document would refresh your</p> <p>9 recollection as to that?</p> <p>10 A. Yes.</p> <p>11 Q. To your understanding, would there be</p> <p>12 any cases in which you had been retained as an</p> <p>13 expert witness that would not be reflected in</p> <p>14 this document?</p> <p>15 A. To the extent that there were ever</p> <p>16 matters that did not result in public appearance,</p> <p>17 there may be engagements that are not listed on</p> <p>18 this document.</p> <p>19 Q. So, to the extent that there are cases</p> <p>20 in which you may have provided opinions but were</p> <p>21 not deposed or testified, they would not be</p> <p>22 reflected in this document?</p> <p>23 A. Starting on page 3, the document that</p> <p>24 we are looking at provides a list of written</p> <p>25 deposition and oral testimony not at deposition</p> <p style="text-align: right;">48</p>



<p>1 WEIR</p> <p>2 that I have given since I began testifying as an</p> <p>3 expert witness.</p> <p>4 So, the caveat would be, any retention</p> <p>5 that did not result in written deposition or</p> <p>6 other oral testimony would not be reflected on</p> <p>7 this list.</p> <p>8 <b>Q. And we can have you review that over</b></p> <p>9 <b>the break that we take.</b></p> <p>10 <b>If you can then turn to Exhibit 2 of</b></p> <p>11 <b>Exhibit 1.</b></p> <p>12 A. Okay.</p> <p>13 <b>Q. The following document, that is the</b></p> <p>14 <b>list of "Documents Reviewed," is how that is</b></p> <p>15 <b>stylized, correct?</b></p> <p>16 A. That's correct.</p> <p>17 <b>Q. And to your understanding, that</b></p> <p>18 <b>document reflects all of the documents that you</b></p> <p>19 <b>reviewed in connection with your retention in</b></p> <p>20 <b>this matter?</b></p> <p>21 A. I think I would want to direct you to</p> <p>22 paragraph 6 of the body of the report, where I</p> <p>23 say:</p> <p>24 "The documents, data and other</p> <p>25 materials that I relied upon in forming my</p> <p style="text-align: right;">49</p>	<p>1 WEIR</p> <p>2 about that, I would be drawing upon my knowledge</p> <p>3 of dozens or hundreds of articles that relate to</p> <p>4 that technique, interpretation of the results,</p> <p>5 execution of that kind of study. Same thing with</p> <p>6 analyzing statistical data.</p> <p>7 So, nothing that I've reviewed again</p> <p>8 in preparation for this testimony. If I had done</p> <p>9 that, I would have listed it.</p> <p>10 But, that's not to say that I won't</p> <p>11 point you to a particular resource if you ask me</p> <p>12 about something where it's a resource that I'm</p> <p>13 familiar with as a result of my education or</p> <p>14 experience.</p> <p>15 <b>Q. So, those would be educational</b></p> <p>16 <b>materials or literature with regard to the</b></p> <p>17 <b>general field of economics, for lack of a more</b></p> <p>18 <b>precise term?</b></p> <p>19 A. I'd say the field of economics and</p> <p>20 surrounding are tangential fields, including</p> <p>21 things like statistics, econometrics, finance,</p> <p>22 accounting, marketing, et cetera.</p> <p>23 <b>Q. But, are there any other documents or</b></p> <p>24 <b>information specific to the Bell &amp; Howell</b></p> <p>25 <b>ultrasonic pest repellents involved in this case</b></p> <p style="text-align: right;">51</p>
<p>1 WEIR</p> <p>2 opinions are identified throughout the report and</p> <p>3 in Exhibit 2 attached hereto.</p> <p>4 "In addition, I have relied upon my</p> <p>5 educational background and more than 14 years of</p> <p>6 experience."</p> <p>7 So, I would say, anything that's cited</p> <p>8 in the body of the report in Exhibit 2 and those</p> <p>9 things that I bring tangentially to bear through</p> <p>10 my educational background and experience are the</p> <p>11 things that I reviewed and relied upon in forming</p> <p>12 my opinions in this case.</p> <p>13 <b>Q. So, the documents that you reviewed</b></p> <p>14 <b>and relied upon would be reflected in this</b></p> <p>15 <b>document and anywhere that documents are</b></p> <p>16 <b>referenced in the body of the report, correct?</b></p> <p>17 A. I think I would let paragraph 6 speak</p> <p>18 for itself.</p> <p>19 <b>Q. With respect to your general</b></p> <p>20 <b>background, are there any documents relative to</b></p> <p>21 <b>this specific case that you reviewed?</b></p> <p>22 A. I don't think I re-reviewed anything,</p> <p>23 but, for example, I bring to bear years of</p> <p>24 experience with hedonic regression.</p> <p>25 So, if we were to have a discussion</p> <p style="text-align: right;">50</p>	<p>1 WEIR</p> <p>2 <b>that you reviewed, other than what is reflected</b></p> <p>3 <b>in your report?</b></p> <p>4 A. I think the report is complete, unless</p> <p>5 by inadvertent omission, as of October 31, 2017.</p> <p>6 I have since reviewed the Declaration</p> <p>7 or report of Mr. Boedeker, as well as -- I know</p> <p>8 there were exhibits to that report. I'm trying</p> <p>9 to remember if I've seen any sort of motion or</p> <p>10 other paperwork filed by Defendants.</p> <p>11 I've also received additional data</p> <p>12 that came as part of the class notice process</p> <p>13 that are not reflected in this Declaration.</p> <p>14 <b>Q. And what is that additional data?</b></p> <p>15 A. It reflects sales information from</p> <p>16 some of the retailers that I cite in here and</p> <p>17 some additional retailers.</p> <p>18 <b>Q. And when did you receive that</b></p> <p>19 <b>information?</b></p> <p>20 A. Between October 31, 2017 and the</p> <p>21 present. As to the precise date, I don't</p> <p>22 recollect as I sit here today.</p> <p>23 MR. WING: Should we take a break and</p> <p>24 allow measurement of the room?</p> <p>25 MR. ARISOHN: Sure. Hopefully he'll</p> <p style="text-align: right;">52</p>





<p>1 WEIR</p> <p>2 be on time.</p> <p>3 (Recess taken.)</p> <p>4 BY MR. WING:</p> <p>5 Q. Mr. Weir, we just discussed over the</p> <p>6 break, but, if you could take a second and look</p> <p>7 through Exhibit 1 and let me know if that</p> <p>8 refreshes your recollection as to how many times</p> <p>9 you have been retained by Bursor &amp; Fisher with</p> <p>10 respect to disclosure as an expert witness.</p> <p>11 A. Okay.</p> <p>12 Q. And just, as you're looking, if you</p> <p>13 could note which of those involve class action</p> <p>14 litigation involving consumer products.</p> <p>15 A. So, you want me to just call these</p> <p>16 out?</p> <p>17 Q. Sure.</p> <p>18 A. Otherwise I'm not going to remember by</p> <p>19 the time I get to the end of the list.</p> <p>20 Okay. So, there's Brenner vs.</p> <p>21 Procter &amp; Gamble.</p> <p>22 Q. And what did that case involve?</p> <p>23 A. The sale of baby wipes.</p> <p>24 Q. I apologize. The sale of baby wipes.</p> <p>25 What were the issues involved?</p> <p>53</p>	<p>1 WEIR</p> <p>2 Q. And what does that case involve?</p> <p>3 A. Trying to remember. My engagement on</p> <p>4 that was limited and I think it might have even</p> <p>5 just involved summing up some of the total sales.</p> <p>6 I think it involved a protein supplement of some</p> <p>7 kind, to the best of my recollection.</p> <p>8 Q. And so, this would have been</p> <p>9 statements made with respect to the</p> <p>10 supplements --</p> <p>11 A. Right. I think it related to the type</p> <p>12 of protein that was involved.</p> <p>13 Q. To your knowledge, is that case still</p> <p>14 pending?</p> <p>15 A. That one I don't have a sense one way</p> <p>16 or the other.</p> <p>17 Bottom of the page, McMillion vs. Rash</p> <p>18 Curtis.</p> <p>19 Q. And what does that case involve?</p> <p>20 A. Violations of the Telephone Consumer</p> <p>21 Protection Act.</p> <p>22 Q. And to your knowledge, is that case</p> <p>23 still pending?</p> <p>24 A. It is.</p> <p>25 So, there's a listing for this case,</p> <p>55</p>
<p>1 WEIR</p> <p>2 A. The issue was that the wipes were</p> <p>3 labeled as being natural and contained numerous</p> <p>4 synthetic chemicals.</p> <p>5 Q. Did you give an opinion in that case</p> <p>6 with regard to full compensatory damages?</p> <p>7 A. I don't think full compensatory</p> <p>8 damages were at issue in that case.</p> <p>9 Next on the list is Martinelli vs.</p> <p>10 Johnson &amp; Johnson.</p> <p>11 Q. And then, what did that case involve?</p> <p>12 A. That involved the sale of a</p> <p>13 cholesterol-lowering, quote/unquote, butter</p> <p>14 substitute product known as Benecol and the</p> <p>15 allegations related to the labeling of that</p> <p>16 product as containing no trans fats.</p> <p>17 Q. And that states that your Declaration</p> <p>18 was submitted on August 28th, 2017. To your</p> <p>19 knowledge, is that case still pending?</p> <p>20 A. To the best of my understanding it is.</p> <p>21 Q. To your knowledge, the prior Procter &amp;</p> <p>22 Gamble case, is that case still pending?</p> <p>23 A. I believe that has been resolved.</p> <p>24 Q. Continue.</p> <p>25 A. Next on the list is Porter vs. NDTY.</p> <p>54</p>	<p>1 WEIR</p> <p>2 Hart and Bueno vs. BHH, et al. Hopefully we</p> <p>3 don't need to summarize that one.</p> <p>4 Q. It's still pending, to your knowledge?</p> <p>5 A. I wouldn't mind going home if you</p> <p>6 resolve the matter today.</p> <p>7 Gulkis vs. Zicam on page 5.</p> <p>8 Q. And what does that case involve?</p> <p>9 A. That is one case that involves</p> <p>10 homeopathic remedies.</p> <p>11 Q. Is that one of the cases that we</p> <p>12 discussed earlier?</p> <p>13 A. It is.</p> <p>14 Q. And to your knowledge, is that case</p> <p>15 still pending?</p> <p>16 A. To the best of my understanding it is.</p> <p>17 But, again, some of these, you know, I gave the</p> <p>18 deposition six months ago and I haven't heard</p> <p>19 much about it since.</p> <p>20 So, I haven't heard that it's over,</p> <p>21 but I also haven't had any active work on it</p> <p>22 recently.</p> <p>23 Q. Continue.</p> <p>24 A. Famular vs. Whirlpool Corporation.</p> <p>25 Q. And what does that case involve?</p> <p>56</p>



<p>1 WEIR</p> <p>2 A. That relates to the Energy Star</p> <p>3 certification of various washing machines.</p> <p>4 Q. And is that case still pending?</p> <p>5 A. To the best of my understanding.</p> <p>6 Q. Continue.</p> <p>7 A. In re: 5-Hour Marketing.</p> <p>8 Q. And what does that case involve?</p> <p>9 A. The quantity of energy provided by a</p> <p>10 5-Hour Energy drink.</p> <p>11 Q. And to your recollection, is that case</p> <p>12 still pending?</p> <p>13 A. To the best of my understanding.</p> <p>14 Q. And just to go back, the case we've</p> <p>15 discussed so far, in each of these cases you've</p> <p>16 been testifying on behalf of class action</p> <p>17 plaintiffs, correct?</p> <p>18 A. Yes.</p> <p>19 Q. Continue.</p> <p>20 A. Jacqueline Dean vs. Colgate.</p> <p>21 Q. And what does that case involve?</p> <p>22 A. The sale of Colgate Optic White</p> <p>23 toothpaste.</p> <p>24 Q. And that was similarly a class action</p> <p>25 plaintiff case, a case in which you were</p> <p>57</p>	<p>1 WEIR</p> <p>2 Q. And what does that case involve?</p> <p>3 A. That's a parallel action to the</p> <p>4 Famular matter, so, Energy Star appliances.</p> <p>5 Q. And to the best of your knowledge, is</p> <p>6 that case still pending?</p> <p>7 A. It is, I believe. Class cert was just</p> <p>8 granted a week or two ago.</p> <p>9 Q. So, do you anticipate that you will be</p> <p>10 providing further assistance in that case?</p> <p>11 A. I have no assignments right now, but,</p> <p>12 if the case is going to move forward to trial, I</p> <p>13 would anticipate continuing in my role as a</p> <p>14 damages quantifier.</p> <p>15 Q. Continue.</p> <p>16 A. Melgar vs. Zicam.</p> <p>17 Q. Is that similar to the other Zicam</p> <p>18 case?</p> <p>19 A. It is.</p> <p>20 Q. And to your knowledge, is that case</p> <p>21 still pending?</p> <p>22 A. To the best of my understanding it is.</p> <p>23 Patrick Hendricks vs. Starkist</p> <p>24 Company.</p> <p>25 Q. And what does that case involve?</p> <p>59</p>
<p>1 WEIR</p> <p>2 testifying on behalf of class action plaintiffs?</p> <p>3 A. Correct.</p> <p>4 Q. And is that case still pending, to the</p> <p>5 best of your knowledge?</p> <p>6 A. It is.</p> <p>7 Q. Continue.</p> <p>8 A. In re: Nest Labs Litigation.</p> <p>9 Q. And what does that case involve?</p> <p>10 A. The sale of Nest Learning Thermostats</p> <p>11 and the promised energy savings from using said</p> <p>12 thermostats.</p> <p>13 Q. And are you testifying on behalf of</p> <p>14 the class action plaintiff in that case?</p> <p>15 A. Yes.</p> <p>16 Q. Does that case involve full</p> <p>17 compensatory damages?</p> <p>18 A. Not to the best of my recollection.</p> <p>19 Q. To your knowledge, is that case still</p> <p>20 pending?</p> <p>21 A. I appreciate that you are clarifying</p> <p>22 to the best of my recollection. I don't think</p> <p>23 so, but, again, I could always be wrong on these.</p> <p>24 Next one at the bottom of the page,</p> <p>25 Dzielak, D-Z-I-E-L-A-K, vs. Whirlpool.</p> <p>58</p>	<p>1 WEIR</p> <p>2 A. The sale of underfilled cans of tuna</p> <p>3 fish.</p> <p>4 Q. And you have been retained on behalf</p> <p>5 of class plaintiffs in that case?</p> <p>6 A. Correct.</p> <p>7 Q. And to your knowledge, is that case</p> <p>8 still pending?</p> <p>9 A. I believe that settlement -- that case</p> <p>10 has settled and been resolved, to the best of my</p> <p>11 understanding.</p> <p>12 Q. Continue.</p> <p>13 A. There are three cases coming up that</p> <p>14 relate to the Kangadis family and companies.</p> <p>15 They basically are the same litigation, just</p> <p>16 being pursued against different defendants or in</p> <p>17 different venues. That was the case we discussed</p> <p>18 earlier that related to the sale of pomace oil as</p> <p>19 being olive oil.</p> <p>20 Q. And that is a case that you testified</p> <p>21 that you previously worked with Yitz Kopel,</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. To your recollection, any of the other</p> <p>25 cases that we've discussed thus far, have you</p> <p>60</p>



<p>1 <b>WEIR</b></p> <p>2 <b>worked with Yitz Kopel?</b></p> <p>3 A. I worked with Mr. Kopel on the Brenner</p> <p>4 case.</p> <p>5 To the best of my recollection, at</p> <p>6 least so far, those are the cases where Mr. Kopel</p> <p>7 has had, I guess what I would say, memorable</p> <p>8 involvement in the case.</p> <p>9 I can't say for certainty that he's</p> <p>10 never done any work in any of the other cases,</p> <p>11 but he's not been a primary point of contact.</p> <p>12 <b>Q. You have personally worked with Yitz</b></p> <p>13 <b>Kopel, to your knowledge, on those cases,</b></p> <p>14 <b>correct?</b></p> <p>15 A. Correct.</p> <p>16 Dei Rossi vs. Whirlpool is another</p> <p>17 case involving Energy Star compliance.</p> <p>18 In re: Scott's EZ Seed Litigation.</p> <p>19 <b>Q. And what did that case involve?</b></p> <p>20 A. A combination grass seed product that</p> <p>21 was emblazoned, "Grows 50 percent thicker with</p> <p>22 half the water," when in reality it grows no</p> <p>23 grass with half the water.</p> <p>24 <b>Q. And what was your role in that</b></p> <p>25 <b>litigation?</b></p> <p style="text-align: right;">61</p>	<p>1 <b>WEIR</b></p> <p>2 A. That related to AT&amp;T Mobility's</p> <p>3 billing system and its accuracy as it related to</p> <p>4 data services.</p> <p>5 And I think those are the last of my</p> <p>6 engagements with Bursor &amp; Fisher.</p> <p>7 <b>Q. So, it looks like that was 2011.</b></p> <p>8 <b>Between 2011 and today you've been retained more</b></p> <p>9 <b>than 15 times on behalf of Bursor &amp; Fisher?</b></p> <p>10 A. If that's what we just tallied up. I</p> <p>11 stopped counting, because I was trying to answer</p> <p>12 your questions. But, if that's the tally --</p> <p>13 <b>Q. You wouldn't disagree with that</b></p> <p>14 <b>statement?</b></p> <p>15 A. No. I think this document should be</p> <p>16 accurate as to that. I know Bursor &amp; Fisher is a</p> <p>17 satisfied customer.</p> <p>18 <b>Q. Since this Declaration has been filed,</b></p> <p>19 <b>are there any additional cases on which you have</b></p> <p>20 <b>been retained by Bursor &amp; Fisher?</b></p> <p>21 A. There may be one or two other</p> <p>22 engagements; I'm not positive that they have</p> <p>23 resulted in a public appearance yet.</p> <p>24 So, I think I can comfortably say</p> <p>25 there are one or two additional engagements, but,</p> <p style="text-align: right;">63</p>
<p>1 <b>WEIR</b></p> <p>2 A. I provided a number of frameworks for</p> <p>3 calculating damages and then worked with another</p> <p>4 team of experts to estimate price premium</p> <p>5 damages.</p> <p>6 <b>Q. And to your recollection, is that case</b></p> <p>7 <b>still pending?</b></p> <p>8 A. To the best of my understanding, it</p> <p>9 is.</p> <p>10 So, there's the Bursor &amp; Fisher vs.</p> <p>11 FCC matter, that's the FOIA request that we</p> <p>12 discussed earlier today.</p> <p>13 And my work involved -- some ways it</p> <p>14 was mathematics exercise to determine whether or</p> <p>15 not certain information could be used to</p> <p>16 reverse-engineer what the telephone companies</p> <p>17 claim was sensitive information to them.</p> <p>18 <b>Q. And to the best of your knowledge, is</b></p> <p>19 <b>that issue resolved with respect to your</b></p> <p>20 <b>involvement?</b></p> <p>21 A. Yeah. I haven't heard about that case</p> <p>22 in a long time. It's my understanding that</p> <p>23 that's over.</p> <p>24 Hendricks vs. AT&amp;T Mobility.</p> <p>25 <b>Q. And what did that case involve?</b></p> <p style="text-align: right;">62</p>	<p>1 <b>WEIR</b></p> <p>2 as to their nature or the precise case, I don't</p> <p>3 know that I'm at liberty to disclose.</p> <p>4 <b>Q. So, you believe you've entertained,</b></p> <p>5 <b>but, at this point, you have not provided a</b></p> <p>6 <b>written opinion; is that fair?</b></p> <p>7 A. I believe that's correct.</p> <p>8 <b>Q. Turning to Exhibit 2, to that report,</b></p> <p>9 <b>the list of documents.</b></p> <p>10 The documents listed in this</p> <p>11 Declaration, are those documents that were</p> <p>12 provided to you by counsel?</p> <p>13 A. Some of them, but not all of them.</p> <p>14 <b>Q. So, there are two, it appears,</b></p> <p>15 <b>journals or journal articles that are cited</b></p> <p>16 <b>there, correct?</b></p> <p>17 A. Yes.</p> <p>18 <b>Q. Were those provided to you by counsel?</b></p> <p>19 A. No.</p> <p>20 <b>Q. Then you list the websites for five</b></p> <p>21 <b>retailers, correct?</b></p> <p>22 A. Correct.</p> <p>23 <b>Q. Do you recall what you reviewed on</b></p> <p>24 <b>those five websites?</b></p> <p>25 A. I think we talked about this at a high</p> <p style="text-align: right;">64</p>



<p>1 WEIR</p> <p>2 level earlier today, but I would have been</p> <p>3 looking at the general nature of the retailer, as</p> <p>4 well as for the information relating to the</p> <p>5 Bell &amp; Howell products.</p> <p>6 Q. Other than those five websites, did</p> <p>7 you review any other websites with respect to</p> <p>8 your retention in this case?</p> <p>9 A. I suppose it's possible, but, without</p> <p>10 doing some additional review, I don't know that I</p> <p>11 could recollect.</p> <p>12 Q. You don't recall any specific websites</p> <p>13 that you reviewed with respect to this case?</p> <p>14 A. Again, I would say there's some small</p> <p>15 possibility, but nothing is jumping to mind.</p> <p>16 Q. Going back to the list of documents,</p> <p>17 other than the two journal articles we discussed</p> <p>18 and the five websites that are listed at the</p> <p>19 bottom, the remaining documents listed in that</p> <p>20 list, were those provided to you by counsel?</p> <p>21 A. They were provided to me by counsel at</p> <p>22 my request.</p> <p>23 Q. So, these are documents that you</p> <p>24 specifically requested from counsel?</p> <p>25 A. I don't know that I specifically</p> <p style="text-align: right;">65</p>	<p>1 WEIR</p> <p>2 everything that has been reviewed. That's why I</p> <p>3 put the catchall that, if it's cited in the</p> <p>4 report, the fact that it doesn't make it into the</p> <p>5 exhibit doesn't make it something that I haven't</p> <p>6 reviewed.</p> <p>7 Q. So, again, everything would be listed</p> <p>8 either in this Declaration or somewhere else in</p> <p>9 the body of the exhibit?</p> <p>10 A. Other than my educational background</p> <p>11 and more than 14 years of experience and</p> <p>12 everything that that entails and that I bring to</p> <p>13 bear.</p> <p>14 Q. But, the documents specific to this</p> <p>15 litigation would be listed somewhere in this</p> <p>16 report, correct?</p> <p>17 A. Unless by inadvertent omission they</p> <p>18 have been left out.</p> <p>19 Q. Have you supplemented this list of</p> <p>20 exhibits with any new documents that you have</p> <p>21 received?</p> <p>22 MR. ARISOHN: Object to form.</p> <p>23 Q. You testified earlier that you have,</p> <p>24 since this Declaration was filed, that you have</p> <p>25 received additional documents and information,</p> <p style="text-align: right;">67</p>
<p>1 WEIR</p> <p>2 requested each document by name, but I requested,</p> <p>3 for example, documents that relate to the sales</p> <p>4 of the Bell &amp; Howell products at issue in this</p> <p>5 litigation, and these are documents that were</p> <p>6 responsive or semi-responsive to that query.</p> <p>7 Q. Were there documents that you</p> <p>8 requested from counsel that you did not receive?</p> <p>9 A. Not to the best of my recollection.</p> <p>10 Q. So, to the best of your recollection,</p> <p>11 the documents listed in this report are the</p> <p>12 entirety of the documents that you requested from</p> <p>13 counsel?</p> <p>14 A. As of the time of this Declaration.</p> <p>15 And again, I want to just say, I would</p> <p>16 refer the reader of the transcript to the whole</p> <p>17 document, not just this specific list, which, as</p> <p>18 I described to you, may or may not be the</p> <p>19 totality of everything I reviewed, pursuant to</p> <p>20 paragraph 6 of the Declaration.</p> <p>21 Q. Well, when you're putting together</p> <p>22 your report, you list this as "Documents</p> <p>23 Reviewed" in this exhibit, correct?</p> <p>24 A. I try to make Exhibit 2 a handy</p> <p>25 reference guide, but it doesn't always capture</p> <p style="text-align: right;">66</p>	<p>1 WEIR</p> <p>2 correct?</p> <p>3 A. Correct.</p> <p>4 Q. Have you supplemented this list of</p> <p>5 documents?</p> <p>6 A. NO.</p> <p>7 MR. ARISOHN: Object to form.</p> <p>8 THE WITNESS: Not at this time.</p> <p>9 Q. Do you anticipate supplementing your</p> <p>10 list of "Documents Reviewed"?</p> <p>11 A. At this time I have not been asked to</p> <p>12 do so, but, if I am asked to do so, I will.</p> <p>13 Q. Going back to our earlier discussion,</p> <p>14 you stated that after you were retained you did</p> <p>15 some analysis to determine the proper measure of</p> <p>16 damages for the --</p> <p>17 A. Correct.</p> <p>18 Q. Some initial analysis?</p> <p>19 MR. ARISOHN: Object to form.</p> <p>20 THE WITNESS: I think what I said was</p> <p>21 something along the lines of, I determined</p> <p>22 the framework for damages that would be</p> <p>23 economically appropriate or that would seek</p> <p>24 to measure the economic harm suffered by the</p> <p>25 Plaintiffs, pursuant to their theory of</p> <p style="text-align: right;">68</p>



<p>1 WEIR</p> <p>2 liability in this litigation.</p> <p>3 <b>Q. And is that analysis reflected in this</b></p> <p>4 <b>report?</b></p> <p>5 A. It is.</p> <p>6 <b>Q. And you also stated that you performed</b></p> <p>7 <b>an analysis of potential statutory damages; is</b></p> <p>8 <b>that correct?</b></p> <p>9 A. I think that is a mischaracterization</p> <p>10 of what I said before.</p> <p>11 <b>Q. What did you do with respect to</b></p> <p>12 <b>statutory damages?</b></p> <p>13 A. I gave consideration to the statutory</p> <p>14 remedies that may be available.</p> <p>15 And again, I'm not a lawyer, so I was</p> <p>16 relying on instructions from counsel as to what</p> <p>17 the law may provide for additional damages and I</p> <p>18 provided a high-level summary of how those</p> <p>19 damages could be calculated, either by me or by</p> <p>20 the judge or the jury, should such statutory</p> <p>21 damages be awarded.</p> <p>22 And I believe in this case it relates</p> <p>23 to the determination of a multiplier for damages</p> <p>24 in California, which would result in either the</p> <p>25 judge or the jury making a determination of a</p> <p style="text-align: right;">69</p>	<p>1 WEIR</p> <p>2 relates to the quantification of economic</p> <p>3 damages, but not as to the determination if or</p> <p>4 what multiplier should be used to determine</p> <p>5 statutory damages.</p> <p>6 <b>Q. Other than the documents that you</b></p> <p>7 <b>requested from counsel and received and the two</b></p> <p>8 <b>journal articles on the five websites, are there</b></p> <p>9 <b>any other documents that you independently</b></p> <p>10 <b>gathered specific to this litigation?</b></p> <p>11 A. There are documents that were</p> <p>12 generated by me, my work papers, but I don't</p> <p>13 believe there were additional source documents</p> <p>14 that I have relied upon other than what we've</p> <p>15 discussed and that have subsequently been</p> <p>16 supplemented following this October 31, 2017</p> <p>17 Declaration.</p> <p>18 <b>Q. So, with respect to your initial</b></p> <p>19 <b>evaluation, your testimony that full compensatory</b></p> <p>20 <b>damages were the proper measure in this case, did</b></p> <p>21 <b>you generate any documents with respect to that</b></p> <p>22 <b>opinion?</b></p> <p>23 A. I did.</p> <p>24 <b>Q. Other than this report?</b></p> <p>25 A. No. The report constitutes my</p> <p style="text-align: right;">71</p>
<p>1 WEIR</p> <p>2 multiplier and then taking the economic damages</p> <p>3 that I've calculated and doing that</p> <p>4 multiplication.</p> <p>5 <b>Q. So, the application of statutory</b></p> <p>6 <b>damages was something that's based on the advice</b></p> <p>7 <b>of counsel?</b></p> <p>8 A. I don't fully understand that</p> <p>9 question.</p> <p>10 <b>Q. Did you do anything independently to</b></p> <p>11 <b>determine potential statutory damages?</b></p> <p>12 MR. ARISOHN: Object to form.</p> <p>13 THE WITNESS: Again, I'm not</p> <p>14 testifying as to whether statutory damages</p> <p>15 should apply, I'm testifying as to how they</p> <p>16 could be applied and calculated should</p> <p>17 whatever legal triggers be met in order to</p> <p>18 allow for those statutory damages.</p> <p>19 <b>Q. So, you have no opinion as to the</b></p> <p>20 <b>actual application of the statute?</b></p> <p>21 A. Again, it's my understanding that the</p> <p>22 statute calls for a multiplication of a factor</p> <p>23 that is to be determined by the judge or the jury</p> <p>24 against the measurement of economic damage.</p> <p>25 And so, I am offering an opinion that</p> <p style="text-align: right;">70</p>	<p>1 WEIR</p> <p>2 opinions about the correct measure of economic</p> <p>3 damages in this case.</p> <p>4 <b>Q. Did you perform any statistical</b></p> <p>5 <b>analysis with respect to that opinion?</b></p> <p>6 A. Well --</p> <p>7 MR. ARISOHN: Object to form.</p> <p>8 THE WITNESS: -- I guess I would say</p> <p>9 that I came to the conclusion that that</p> <p>10 would be the correct form of damages and</p> <p>11 then later affirmed that conclusion with</p> <p>12 some statistical analysis.</p> <p>13 <b>Q. And that statistical analysis would be</b></p> <p>14 <b>reflected in the report?</b></p> <p>15 A. It's described at a high level in the</p> <p>16 report. Yes.</p> <p>17 (Defendant's Exhibit 2, Subpoena,</p> <p>18 marked for identification as of this date.)</p> <p>19 <b>Q. Please take a second to review that.</b></p> <p>20 <b>Mr. Weir, do you recognize that</b></p> <p>21 <b>document?</b></p> <p>22 A. I've seen this or something like it.</p> <p>23 <b>Q. And if you could, what is that</b></p> <p>24 <b>document?</b></p> <p>25 A. It is a subpoena for the production of</p> <p style="text-align: right;">72</p>





<p>1 WEIR</p> <p>2 documents.</p> <p>3 Q. So, it's a subpoena to you for</p> <p>4 production of certain documents?</p> <p>5 A. Again, I'm not a lawyer, but that's my</p> <p>6 best understanding of what this document</p> <p>7 reflects.</p> <p>8 Q. And if you turn to the last page of</p> <p>9 that document, it's titled, "Rider to Subpoena,"</p> <p>10 correct?</p> <p>11 A. I see that.</p> <p>12 Q. And that document lists 13 categories</p> <p>13 of documents that are being requested, correct?</p> <p>14 A. There are 13 document requests.</p> <p>15 Q. And have you reviewed that document or</p> <p>16 something similar?</p> <p>17 A. Yes.</p> <p>18 Q. And have you done anything to comply</p> <p>19 with the document requests in that document?</p> <p>20 A. To the best of my recollection,</p> <p>21 documents were collected that were responsive to</p> <p>22 this list of requests and provided to counsel for</p> <p>23 Plaintiffs. I can only presume that they pass</p> <p>24 them along to you, subject to their own</p> <p>25 objections to these requests.</p> <p>73</p>	<p>1 WEIR</p> <p>2 MR. ARISOHN: I think you asked him</p> <p>3 about a communication of counsel. So, if</p> <p>4 you rephrase the question.</p> <p>5 Q. So, there may have been documents that</p> <p>6 were responsive to these requests that you did</p> <p>7 not produce to counsel?</p> <p>8 A. I don't have a precise recollection</p> <p>9 one way or the other.</p> <p>10 Q. You understand that this is a subpoena</p> <p>11 to you that you were bound to respond to,</p> <p>12 correct?</p> <p>13 A. I understand that it's a subpoena.</p> <p>14 Q. I guess we will go down the list.</p> <p>15 The first request: Your complete file</p> <p>16 related to this litigation.</p> <p>17 Do you understand that you produced</p> <p>18 your complete file related to this litigation?</p> <p>19 A. Subject to the Rules of Disclosure</p> <p>20 under Federal Rule 26, I believe that I have.</p> <p>21 Q. And your understanding of the scope of</p> <p>22 disclosure under Federal Rule 26 is that based on</p> <p>23 discussions with counsel?</p> <p>24 A. Yes.</p> <p>25 Q. Do you have an understanding of what</p> <p>75</p>
<p>1 WEIR</p> <p>2 Q. To the best of your knowledge, you</p> <p>3 have produced any documents responsive to this</p> <p>4 request to counsel, correct?</p> <p>5 A. Subject to their objections to certain</p> <p>6 requests.</p> <p>7 Q. As far as what they passed on to us,</p> <p>8 I'm not discussing that. I'm saying, you have</p> <p>9 produced anything to them that would be</p> <p>10 responsive to this request?</p> <p>11 A. And what I'm saying is, I've produced</p> <p>12 anything that is responsive to the requests that</p> <p>13 I was informed were legitimate requests not</p> <p>14 subject to objection by counsel for Plaintiffs.</p> <p>15 Q. So, your understanding is that counsel</p> <p>16 may have advised you not to provide certain</p> <p>17 documents?</p> <p>18 MR. ARISOHN: I think we're going</p> <p>19 beyond the scope of communications that are</p> <p>20 to be asked at depositions of an expert here</p> <p>21 under Rule 26.</p> <p>22 MR. WING: I'm questioning with</p> <p>23 regards to documents that he produced</p> <p>24 in this litigation, subject to the</p> <p>25 subpoena that --</p> <p>74</p>	<p>1 WEIR</p> <p>2 documents you may have withheld pursuant to</p> <p>3 Rule 26 of the Federal Rules of Disclosure?</p> <p>4 A. The thing that immediately jumps to</p> <p>5 mind is any draft work product.</p> <p>6 Q. So, to the extent that you have drafts</p> <p>7 of this report, those were not produced, correct?</p> <p>8 A. I believe drafts in any form were not</p> <p>9 produced.</p> <p>10 Q. Are there any other documents that you</p> <p>11 recall that you did not produce pursuant to</p> <p>12 Federal Rule 26?</p> <p>13 A. Not that I can recollect as I sit here</p> <p>14 today.</p> <p>15 Q. So, any documents in your file with</p> <p>16 respect to this litigation, other than documents</p> <p>17 that you were instructed not to produce by</p> <p>18 counsel, you have produced in this litigation, to</p> <p>19 your understanding?</p> <p>20 A. I believe I produced anything in my</p> <p>21 file that was subject to disclosure under Rule 26</p> <p>22 that had not already been produced in the</p> <p>23 litigation.</p> <p>24 So, for example, documents that came</p> <p>25 from Defendant, I don't believe I produced those</p> <p>76</p>



<p>1 WEIR</p> <p>2 back.</p> <p>3 Q. I see. But, to the extent that those</p> <p>4 documents were something that you reviewed and</p> <p>5 relied on and would be in your file, those would</p> <p>6 be reflected in your report, correct? Either in</p> <p>7 that list of documents or somewhere in the body,</p> <p>8 correct?</p> <p>9 A. Correct. And would be, at least, I</p> <p>10 would presume, in your possession.</p> <p>11 Q. Thank you.</p> <p>12 If we turn back to Exhibit 1, which is</p> <p>13 your report.</p> <p>14 A. Okay.</p> <p>15 Q. If we look at paragraph 3, that states</p> <p>16 you have "been advised that Plaintiffs allege</p> <p>17 that this claim is misleading to reasonable</p> <p>18 consumers because the products do not repel pests</p> <p>19 at all and are ineffective and worthless."</p> <p>20 Correct? Do you see that?</p> <p>21 A. I see that. Yes.</p> <p>22 Q. And that statement is based on the</p> <p>23 allegations of the complaints in your discussions</p> <p>24 with counsel, correct?</p> <p>25 A. Correct.</p> <p style="text-align: right;">77</p>	<p>1 WEIR</p> <p>2 opinion as to liability, to the best of my</p> <p>3 recollection I have not looked at studies as to</p> <p>4 the effectiveness of pest repellents.</p> <p>5 Q. And other than the rebuttal report of</p> <p>6 Mr. Boedeker, which you've said you reviewed,</p> <p>7 have you reviewed any of the expert reports in</p> <p>8 this case?</p> <p>9 A. Again, because establishing liability</p> <p>10 was beyond the scope of my assignment, I did not</p> <p>11 look at the other experts who are, I guess,</p> <p>12 involved in the establishment of liability one</p> <p>13 way or the other.</p> <p>14 Q. And you didn't do any other research</p> <p>15 with respect to the general effectiveness of the</p> <p>16 ultrasonic pest repellents?</p> <p>17 A. Again, because it's beyond the scope</p> <p>18 of my assignment to determine liability, I did</p> <p>19 not conduct any additional research to determine</p> <p>20 whether liability should or should not be</p> <p>21 established.</p> <p>22 Q. Did you do any independent research</p> <p>23 with respect to whether the pest repellents were</p> <p>24 worthless?</p> <p>25 A. I did do some research in that regard.</p> <p style="text-align: right;">79</p>
<p>1 WEIR</p> <p>2 Q. Did you do anything independently to</p> <p>3 research whether the devices were ineffective?</p> <p>4 A. That's beyond the scope of my</p> <p>5 assignment to make that determination, so I did</p> <p>6 not conduct any further independent research to</p> <p>7 make a determination as to whether liability</p> <p>8 should or should not be established in this case.</p> <p>9 Q. So, you are not offering an opinion as</p> <p>10 to whether the devices were, in fact,</p> <p>11 ineffective, correct?</p> <p>12 A. That is correct. I am not offering an</p> <p>13 opinion one way or the other as to whether the</p> <p>14 devices are ineffective.</p> <p>15 My opinions stem from an assumption</p> <p>16 that Plaintiffs are able to establish their</p> <p>17 theory of liability, which is the noted first</p> <p>18 step in a damages analysis.</p> <p>19 But, as to whether they are successful</p> <p>20 in that endeavor, I have not offered an opinion</p> <p>21 one way or the other.</p> <p>22 Q. So, you haven't reviewed any studies</p> <p>23 with respect to the effectiveness of ultrasonic</p> <p>24 pest repellents, correct?</p> <p>25 A. Again, because I'm not offering an</p> <p style="text-align: right;">78</p>	<p>1 WEIR</p> <p>2 Q. And what research did you conduct with</p> <p>3 respect to whether they were worthless?</p> <p>4 A. After the assumption of Plaintiffs'</p> <p>5 theory of liability, I did research to determine</p> <p>6 whether what I would describe as ancillary or</p> <p>7 subsidiary features of the product garnered any</p> <p>8 value in the marketplace as measured by price.</p> <p>9 Q. So, that's a discussion that's later</p> <p>10 in your report, correct?</p> <p>11 A. Correct.</p> <p>12 Q. We will get there.</p> <p>13 Other than that, prior to that</p> <p>14 analysis that you just described, did you do any</p> <p>15 other research with respect to whether repellents</p> <p>16 were worthless?</p> <p>17 A. Other than my understanding of the</p> <p>18 Complaint and Plaintiffs' claims in this action</p> <p>19 and that further analysis, I have done no</p> <p>20 additional analysis to make a determination that</p> <p>21 the repellents are worthless. I understand that</p> <p>22 that is part and parcel of the theory of</p> <p>23 liability.</p> <p>24 Q. So, that is based entirely on the</p> <p>25 assumption based on the allegations in the</p> <p style="text-align: right;">80</p>



<p>1 WEIR</p> <p>2 <b>Complaint that the devices are entirely</b></p> <p>3 <b>ineffective with respect to pests, correct?</b></p> <p>4 A. No. It's an assumption that</p> <p>5 Plaintiffs are able to establish their theory of</p> <p>6 liability. What that will require is beyond the</p> <p>7 scope of my engagement.</p> <p>8 <b>Q. Did you do any independent market</b></p> <p>9 <b>research with respect to whether these devices</b></p> <p>10 <b>were, in fact, worthless?</b></p> <p>11 A. I guess maybe we're talking around in</p> <p>12 circles. The market research that I did is based</p> <p>13 on the assumption that Plaintiffs establish their</p> <p>14 theory of liability that these products don't</p> <p>15 repel pests.</p> <p>16 And so, my research finds that, if</p> <p>17 these products that are designated as pest</p> <p>18 repellers do not repel pests, then they have no</p> <p>19 value in the marketplace.</p> <p>20 And I did some additional research to</p> <p>21 determine whether or not, within the context of</p> <p>22 the type of product that we were dealing with,</p> <p>23 any ancillary features would provide any market</p> <p>24 value as measured by price and made the</p> <p>25 determination that they do not.</p> <p>81</p>	<p>1 WEIR</p> <p>2 <b>respect to any other component of your analysis?</b></p> <p>3 A. Again, in terms of determining full</p> <p>4 compensatory damages, subtracting the returns</p> <p>5 from the analysis is the appropriate way to</p> <p>6 account for them.</p> <p>7 If you're talking about whether or not</p> <p>8 I gave consideration as to whether liability</p> <p>9 should be established based upon that</p> <p>10 information, that is beyond the scope of my</p> <p>11 engagement, and so I did not consider that data</p> <p>12 that way.</p> <p>13 <b>Q. Did you use that data with respect to</b></p> <p>14 <b>your analysis of whether full compensatory</b></p> <p>15 <b>damages would be appropriate in this case?</b></p> <p>16 A. No. It would not be appropriate to do</p> <p>17 so given Plaintiffs' stated theory of liability.</p> <p>18 <b>Q. So, it's your understanding that,</b></p> <p>19 <b>based on Plaintiffs' established theory of</b></p> <p>20 <b>liability, that, in order to establish liability,</b></p> <p>21 <b>they must establish that the devices in question</b></p> <p>22 <b>were entirely ineffective?</b></p> <p>23 A. You've asked that three times now and</p> <p>24 you keep mischaracterizing my testimony, so I</p> <p>25 would ask you to pay attention to what I'm saying</p> <p>83</p>
<p>1 WEIR</p> <p>2 <b>Q. Did you review any customer reviews or</b></p> <p>3 <b>ratings with respect to the devices?</b></p> <p>4 A. No, I did not.</p> <p>5 <b>Q. Did you review the return rates of the</b></p> <p>6 <b>devices in the documents that were provided to</b></p> <p>7 <b>you?</b></p> <p>8 A. I did review those rates, but, much</p> <p>9 like the customer reviews, I don't believe they</p> <p>10 are dispositive as to whether liability should or</p> <p>11 should not be established and they're certainly</p> <p>12 not dispositive as to what the damages should be</p> <p>13 if Plaintiffs are successful in establishing</p> <p>14 their theory of liability.</p> <p>15 <b>Q. So, that is not data that you utilized</b></p> <p>16 <b>in providing any of your opinions?</b></p> <p>17 A. Well, the return data is something</p> <p>18 that I did include, because I subtracted from my</p> <p>19 damages analysis the returns.</p> <p>20 <b>Q. So, you considered them from a</b></p> <p>21 <b>mathematical standpoint, correct?</b></p> <p>22 A. Correct. If a customer already got</p> <p>23 their money back, they did not recover damages in</p> <p>24 the case.</p> <p>25 <b>Q. But, you did not consider them with</b></p> <p>82</p>	<p>1 WEIR</p> <p>2 and please don't intentionally mischaracterize</p> <p>3 the testimony, which is that, I'm not offering an</p> <p>4 opinion as to what Plaintiffs must do to</p> <p>5 establish liability, I'm simply assuming that</p> <p>6 they are able to establish liability in this</p> <p>7 case.</p> <p>8 <b>Q. And beyond your review of what your</b></p> <p>9 <b>understanding of what Plaintiffs must establish</b></p> <p>10 <b>or must show to establish liability in this case,</b></p> <p>11 <b>did you review anything else to determine that</b></p> <p>12 <b>full compensatory damages were appropriate?</b></p> <p>13 A. I reviewed the Complaint, I reviewed</p> <p>14 the nature of the product, I looked at the retail</p> <p>15 market for these products and I conducted a</p> <p>16 statistical exercise to determine whether or not,</p> <p>17 above and beyond repelling pests, whether there</p> <p>18 was any value of the ancillary features of some</p> <p>19 of these products as measured by price in the</p> <p>20 marketplace and determine that there was not.</p> <p>21 <b>Q. Is that statistical analysis that you</b></p> <p>22 <b>conducted, is that reflected in the documents</b></p> <p>23 <b>that were in your file that were produced?</b></p> <p>24 A. To the best of my understanding, yes.</p> <p>25 <b>Q. And when did you conduct this</b></p> <p>84</p>



<p>1 <b>WEIR</b></p> <p>2 statistical analysis of the ancillary features,</p> <p>3 as you described them?</p> <p>4 A. Sometime prior to October 31, 2017.</p> <p>5 But, as to the precise date, I don't have a</p> <p>6 recollection, as I sit here today.</p> <p>7 <b>Q. And what did that statistical analysis</b></p> <p>8 <b>consist of?</b></p> <p>9 A. In comparison of the prices of various</p> <p>10 pest repellents against one another to determine</p> <p>11 whether or not there was a statistically</p> <p>12 significant difference in price that was</p> <p>13 resulting from the inclusion of one or more of</p> <p>14 the ancillary features.</p> <p>15 And that analysis, as confirmed by</p> <p>16 your own expert, actually, indicates that there</p> <p>17 is little or no value associated with those</p> <p>18 ancillary features.</p> <p>19 <b>Q. When you drafted this report, did you</b></p> <p>20 <b>quantify the ancillary features that you were</b></p> <p>21 <b>analyzing in your statistical analysis?</b></p> <p>22 A. I did quantify them and determined</p> <p>23 that the value was zero.</p> <p>24 <b>Q. And where is that quantification of</b></p> <p>25 <b>the ancillary features on this report?</b></p> <p style="text-align: right;">85</p>	<p>1 <b>WEIR</b></p> <p>2 report.</p> <p>3 <b>Q. So, it's your understanding that any</b></p> <p>4 <b>and all statistical evaluation that you did would</b></p> <p>5 <b>be reflected in the documents that you provided</b></p> <p>6 <b>as part of your file to this report?</b></p> <p>7 A. Anything that involved a precise</p> <p>8 calculation would be present there. Anything</p> <p>9 that was determined based upon review of the</p> <p>10 sales data would be based upon the sales data</p> <p>11 that's been provided to you, but may not be</p> <p>12 explicitly reflected in those documents. So,</p> <p>13 there's probably a combination of both.</p> <p>14 <b>Q. Your review of the sales data wouldn't</b></p> <p>15 <b>be a statistical analysis, correct?</b></p> <p>16 A. I would disagree with that</p> <p>17 characterization.</p> <p>18 <b>Q. Do you believe that your eyeball</b></p> <p>19 <b>review of the documents consist of a statistical</b></p> <p>20 <b>evaluation of that data?</b></p> <p>21 A. It can be. Yes. When you have sales</p> <p>22 information from one product and sales</p> <p>23 information from another product that is</p> <p>24 otherwise identical but for one attribute, one</p> <p>25 can analyze that data with a simple review of the</p> <p style="text-align: right;">87</p>
<p>1 <b>WEIR</b></p> <p>2 A. Paragraph 19, I state:</p> <p>3 "My analysis of this data indicates</p> <p>4 that there is no statistically significant price</p> <p>5 premium for additional features such as a night</p> <p>6 light.</p> <p>7 "It is my professional opinion that</p> <p>8 the retail sales data presently available in this</p> <p>9 litigation indicate that such features have no</p> <p>10 additional value in the marketplace and as such</p> <p>11 no additional adjustments need to be made as to</p> <p>12 my analyses presented above."</p> <p>13 <b>Q. And that states that your professional</b></p> <p>14 <b>opinion is that there is no statistical</b></p> <p>15 <b>significance. I'm asking, where is that</b></p> <p>16 <b>statistical analysis set forth in this report?</b></p> <p>17 <b>I'm asking, where is that statistical</b></p> <p>18 <b>analysis set forth in this report?</b></p> <p>19 A. So, again, I describe the statistical</p> <p>20 analysis in the preceding sentence, where I say:</p> <p>21 "I have examined the sales data</p> <p>22 available in this litigation, including data from</p> <p>23 retailers such as Walmart."</p> <p>24 And that examination is included in my</p> <p>25 work papers that are the background to this</p> <p style="text-align: right;">86</p>	<p>1 <b>WEIR</b></p> <p>2 data without needing to do a complicated</p> <p>3 analysis.</p> <p>4 <b>Q. And you did not conduct any such</b></p> <p>5 <b>detailed analysis with respect to the majority of</b></p> <p>6 <b>the products involved in this litigation,</b></p> <p>7 <b>correct?</b></p> <p>8 A. There was a detailed analysis</p> <p>9 conducted from some products and a less detailed</p> <p>10 analysis conducted for other products.</p> <p>11 <b>Q. Looking at paragraph 7 of your report,</b></p> <p>12 <b>it says:</b></p> <p>13 "As a threshold matter, it is my</p> <p>14 opinion that it is possible to determine</p> <p>15 class-wide damages in this case using the</p> <p>16 Defendant's own available business records and</p> <p>17 documents, third-party retailer business records</p> <p>18 and available market research data."</p> <p>19 <b>Correct?</b></p> <p>20 A. I believe you read paragraph 7, but</p> <p>21 I'll let the document speak for itself.</p> <p>22 <b>Q. Well, you have it in front of you. Is</b></p> <p>23 <b>that accurate, what I just read?</b></p> <p>24 A. Again, I wasn't listening word for</p> <p>25 word, I was looking at paragraph 7. I'll let the</p> <p style="text-align: right;">88</p>





<p>1 WEIR</p> <p>2 document speak for itself.</p> <p>3 Q. And those three items that you</p> <p>4 identify, are those items that you reviewed with</p> <p>5 respect to drafting this report?</p> <p>6 A. Yes.</p> <p>7 Q. You say, "Defendant's own available</p> <p>8 business record and documents." That's the</p> <p>9 wholesale records that were provided to you,</p> <p>10 correct?</p> <p>11 A. Amongst other things.</p> <p>12 Q. That would also involve the product</p> <p>13 descriptions; is that --</p> <p>14 A. Product descriptions, labels. There</p> <p>15 may be some others things. It's been awhile</p> <p>16 since I've looked through all of those documents.</p> <p>17 Q. Other than the wholesale records, the</p> <p>18 product descriptions and the product labels, did</p> <p>19 you review any other business records or</p> <p>20 documents of the Defendant?</p> <p>21 A. Anything that is cited in the body of</p> <p>22 the report for Exhibit 2 thereto I reviewed.</p> <p>23 Q. Next you discuss third-party retailer</p> <p>24 business records, correct?</p> <p>25 A. Yes.</p> <p style="text-align: right;">89</p>	<p>1 WEIR</p> <p>2 Q. To the extent that you've received</p> <p>3 subsequent retail sales information, have you</p> <p>4 supplemented your response to the document</p> <p>5 request we reviewed earlier?</p> <p>6 A. You mean deposition Exhibit 2?</p> <p>7 Q. Yes.</p> <p>8 A. I am aware that counsel for Plaintiff</p> <p>9 is in possession of any additional retail sales</p> <p>10 figures; whether or not they have provided them</p> <p>11 to you, I can't speak for them.</p> <p>12 Q. Have you instructed counsel to</p> <p>13 supplement its production pursuant to your</p> <p>14 obligations under that subpoena?</p> <p>15 MR. ARISOHN: Objection to the extent</p> <p>16 it calls for communication with counsel.</p> <p>17 You can answer the question.</p> <p>18 THE WITNESS: NO.</p> <p>19 Q. With respect to those additional</p> <p>20 business records you have received, have you</p> <p>21 performed any analysis of that data?</p> <p>22 A. Yes.</p> <p>23 Q. Have you generated any documents with</p> <p>24 respect to that analysis?</p> <p>25 A. It's possible. Yes.</p> <p style="text-align: right;">91</p>
<p>1 WEIR</p> <p>2 Q. With respect to this report, that</p> <p>3 would be the sales figures from five retailers,</p> <p>4 correct?</p> <p>5 A. I don't remember the precise number,</p> <p>6 but there were several retailers. Yes.</p> <p>7 Q. To your recollection, that would be</p> <p>8 Walmart, Dr. Leonard's, Home Shopping Network,</p> <p>9 Harriet Carter and Family Dollar, correct?</p> <p>10 A. If that's stated in the report, then</p> <p>11 I'll accept your representation. Yeah. Here it</p> <p>12 is, paragraph 13, Dr. Leonard's, Family Dollar,</p> <p>13 Harriet Carter, Home Shopping Network and</p> <p>14 Walmart.</p> <p>15 Q. Did you receive any third-party</p> <p>16 retailer business records from any entities other</p> <p>17 than those five?</p> <p>18 A. I have subsequently received retail</p> <p>19 data from additional retailers, but not as of the</p> <p>20 time of this Declaration.</p> <p>21 So, this retail data comprised, I</p> <p>22 believe, call it 70-odd percent of the totality</p> <p>23 of retail sales and, again, I've received</p> <p>24 additional retail sales data subsequent to the</p> <p>25 signing of this Declaration.</p> <p style="text-align: right;">90</p>	<p>1 WEIR</p> <p>2 Q. For which retailers have you received</p> <p>3 additional information subsequent to this report?</p> <p>4 A. There was at least one pharmacy chain.</p> <p>5 Again, without the documents in front of me, I</p> <p>6 may be misspeaking. But, I believe it was</p> <p>7 Rite Aid. But, if you told me it was Walgreen's,</p> <p>8 that could be the case. I would let the data</p> <p>9 speak for itself.</p> <p>10 I believe I received data from</p> <p>11 Publishers Clearing House and there may be --</p> <p>12 there may be additional retailer data that was</p> <p>13 included. But, those are the ones that stick in</p> <p>14 my mind as I sit here today.</p> <p>15 Q. And for Rite Aid and Publishers</p> <p>16 Clearing House, what type of data have you</p> <p>17 received?</p> <p>18 A. I believe it is similar to that that I</p> <p>19 received for the five retailers mentioned in this</p> <p>20 Declaration. It relates to the retail sales data</p> <p>21 of the Bell &amp; Howell pest repellents that are the</p> <p>22 subject of this litigation.</p> <p>23 Q. And when you say "retail sales</p> <p>24 information," without having had the documents</p> <p>25 produced and in front of me, what information,</p> <p style="text-align: right;">92</p>





<p>1 WEIR</p> <p>2 with respect to Rite Aid and Publishers Clearing</p> <p>3 House, again, what type of data have you</p> <p>4 received?</p> <p>5 A. It's going to relate to the</p> <p>6 identification of customers that purchased</p> <p>7 Bell &amp; Howell and information relating to the</p> <p>8 quantity of units and/or price that are involved</p> <p>9 in those transactions, to the best of my</p> <p>10 recollection, as I sit here today.</p> <p>11 Q. So, with respect to Rite Aid, have you</p> <p>12 received data reflecting the number of units of</p> <p>13 the Bell &amp; Howell pest repellents that have been</p> <p>14 sold?</p> <p>15 A. To the best of my recollection, we</p> <p>16 received data from Rite Aid that relates to the</p> <p>17 number of units of Bell &amp; Howell pest repellents</p> <p>18 that they sold, I think, on a nationwide basis,</p> <p>19 as well as on a state-by-state basis.</p> <p>20 Q. With respect to Rite Aid, have you</p> <p>21 received data with respect to the dollar amount</p> <p>22 of retail sales of the Bell &amp; Howell pest</p> <p>23 repellents?</p> <p>24 A. That I would have to go back and</p> <p>25 refresh my recollection. I don't recall</p> <p style="text-align: right;">93</p>	<p>1 WEIR</p> <p>2 repellents that were sold by our company during</p> <p>3 the relevant class period, correct?</p> <p>4 A. Again, I don't know that there is such</p> <p>5 an express statement, but there's data that's</p> <p>6 available that can allow you to understand that</p> <p>7 information.</p> <p>8 Q. With respect to the the five retailers</p> <p>9 that are set forth in your report, it is your</p> <p>10 express understanding that the data that you have</p> <p>11 been provided is intended to be a quantification</p> <p>12 of the number of units sold during the relevant</p> <p>13 class period, correct?</p> <p>14 A. It's my understanding that that is one</p> <p>15 data point that the collection of data that I</p> <p>16 have received is able to answer that question.</p> <p>17 Q. Well, with respect to Walmart, it is</p> <p>18 your understanding that the information provided</p> <p>19 by Walmart includes a specific statement as to</p> <p>20 the number of units sold by Walmart during the</p> <p>21 relevant class period, correct?</p> <p>22 A. See, you keep describing this as a</p> <p>23 specific statement and it sounds like you're not</p> <p>24 understanding the nature of the data that's been</p> <p>25 produced.</p> <p style="text-align: right;">95</p>
<p>1 WEIR</p> <p>2 precisely as I sit here today.</p> <p>3 Q. With respect to Publishers Clearing</p> <p>4 House, have you received documents reflecting the</p> <p>5 amount of units sold of the Bell &amp; Howell pest</p> <p>6 repellents?</p> <p>7 A. Again, it's my recollection that we</p> <p>8 received information that relates to the number</p> <p>9 of units sold of the Bell &amp; Howell pest</p> <p>10 repellents.</p> <p>11 Q. To be more precise, have you received</p> <p>12 documents that specifically state the number of</p> <p>13 units sold of the Bell &amp; Howell pest repellents</p> <p>14 during the class period?</p> <p>15 A. Again, whether they make such an</p> <p>16 express statement or whether they allow you to</p> <p>17 understand that answer, I don't quite recollect.</p> <p>18 But, it's information that relates to the number</p> <p>19 of units sold during the class period.</p> <p>20 Q. "Information that relates" is a very</p> <p>21 broad statement.</p> <p>22 With respect to the retailers set</p> <p>23 forth in your report, it is my understanding that</p> <p>24 you have received data and relied on data that</p> <p>25 specifically states this is the number of</p> <p style="text-align: right;">94</p>	<p>1 WEIR</p> <p>2 They produced either PDF or</p> <p>3 spreadsheet data that allows you to answer that</p> <p>4 question, but I don't know that Walmart said this</p> <p>5 is the number of repellents that has been sold</p> <p>6 during the class period.</p> <p>7 So, we can answer that question</p> <p>8 precisely using the Walmart data, but I don't</p> <p>9 know that Walmart has issued an express statement</p> <p>10 the way that you are describing it.</p> <p>11 Q. And the data that has been provided by</p> <p>12 Rite Aid, is that substantially similar to the</p> <p>13 data that's been provided by Walmart?</p> <p>14 A. Again, without having them in front, I</p> <p>15 believe they relate to the same topic, which is</p> <p>16 the unit sales of the Bell &amp; Howell pest</p> <p>17 repellents and other information salient to</p> <p>18 determining class-wide damages. Whether they are</p> <p>19 substantively the same, that may be in the eye of</p> <p>20 the beholder.</p> <p>21 Q. With respect to Publishers Clearing</p> <p>22 House, have you received data reflecting the</p> <p>23 monetary sales of Bell &amp; Howell pest repellents?</p> <p>24 A. Again, I would need to go back and</p> <p>25 check that data specifically for that.</p> <p style="text-align: right;">96</p>



<p>1 WEIR</p> <p>2 Q. So, these are the two retailers for</p> <p>3 which you recall receiving updated data following</p> <p>4 this Declaration, correct?</p> <p>5 A. Those are the two that I can recollect</p> <p>6 as I sit here today. There may be others.</p> <p>7 Q. You don't recall whether you have</p> <p>8 received anything from those retailers with</p> <p>9 respect to the price of the units?</p> <p>10 A. Again, the problem is, I haven't</p> <p>11 memorized everything that's in these voluminous</p> <p>12 spreadsheets.</p> <p>13 So, there may very well be data as to</p> <p>14 aggregate sales that can be used to determine</p> <p>15 price, but I don't recollect the precise format</p> <p>16 of the data, so I'm hesitant to promise exactly</p> <p>17 what's in the spreadsheets that have been</p> <p>18 produced.</p> <p>19 Q. Since your receipt of this data</p> <p>20 subsequent to the expert report that has been</p> <p>21 filed in this case, have you performed any</p> <p>22 analysis of the price of the Bell &amp; Howell pest</p> <p>23 repellers?</p> <p>24 A. The analysis that I've done is to</p> <p>25 affirm my calculation of aggregate class-wide</p> <p style="text-align: right;">97</p>	<p>1 WEIR</p> <p>2 With respect to those records, are</p> <p>3 those records that you requested from counsel?</p> <p>4 A. I believe I was made aware of their</p> <p>5 existence and then I requested them.</p> <p>6 Q. Since this report was filed, have you</p> <p>7 requested any other documents from counsel or</p> <p>8 anyone else?</p> <p>9 A. I don't think I've requested any</p> <p>10 additional documents. As I said before, I did</p> <p>11 receive the Boedeker report and exhibits and</p> <p>12 potentially some moving papers that came with it,</p> <p>13 I don't recall precisely what.</p> <p>14 Q. Since this report was submitted, you</p> <p>15 have receive Mr. Boedeker's report and any</p> <p>16 associated documents, correct?</p> <p>17 A. Correct.</p> <p>18 Q. And the records from retailers that we</p> <p>19 were discussing earlier, correct?</p> <p>20 A. Correct.</p> <p>21 Q. Have you received any other documents</p> <p>22 since this report was submitted?</p> <p>23 A. To the best of my recollection, not as</p> <p>24 it relates to this case. I mean, obviously I get</p> <p>25 documents all the time.</p> <p style="text-align: right;">99</p>
<p>1 WEIR</p> <p>2 damages and the additional sales data that I have</p> <p>3 received indicates that my analysis in the</p> <p>4 October 31, 2017 report is a good estimate of the</p> <p>5 aggregate class-wide damages for any of either</p> <p>6 the nationwide class, multistate class or</p> <p>7 California class.</p> <p>8 And if we were to make a revision</p> <p>9 based upon the new data, it would result in a</p> <p>10 slight increase in the total of class-wide</p> <p>11 damages.</p> <p>12 So, I feel very comfortable with the</p> <p>13 conservative and accurate nature of the numbers</p> <p>14 that I have set forth in the October 31st, 2017</p> <p>15 Declaration.</p> <p>16 MR. ARISOHN: Can we take a break</p> <p>17 sometime soon?</p> <p>18 MR. WING: Yeah. We can take a break</p> <p>19 now.</p> <p>20 (Recess taken.)</p> <p>21 BY MR. WING:</p> <p>22 Q. Before the break, Mr. Weir, we were</p> <p>23 discussing the additional retailer records that</p> <p>24 you have received since this report was</p> <p>25 completed.</p> <p style="text-align: right;">98</p>	<p>1 WEIR</p> <p>2 Q. You have not received any documents</p> <p>3 specific to your retention in this matter since</p> <p>4 this report was submitted?</p> <p>5 A. Other than the things we just talked</p> <p>6 about, not to the best of my recollection.</p> <p>7 Q. Is it possible that you received other</p> <p>8 documents that you don't recall?</p> <p>9 A. My memory is not perfect. So, there's</p> <p>10 nothing that's jumping to mind, but I'm leaving</p> <p>11 myself a caveat that it's possible. It's</p> <p>12 possible.</p> <p>13 Q. With respect to the additional</p> <p>14 third-party retailer records that you have</p> <p>15 received, have you conducted an analysis with</p> <p>16 respect to those records similar to the analysis</p> <p>17 you performed with respect to the prior records?</p> <p>18 A. I guess what I would describe is that</p> <p>19 I have ongoing work to analyze those records</p> <p>20 within the framework -- a similar framework to</p> <p>21 what I've produced in the October 31st document.</p> <p>22 Q. So, by "ongoing," you mean have not</p> <p>23 completed any analysis that you would perform</p> <p>24 with respect to those documents?</p> <p>25 A. Correct.</p> <p style="text-align: right;">100</p>



<p>1 WEIR</p> <p>2 Q. Have you requested any additional</p> <p>3 documents with respect to your work in this case</p> <p>4 that you have not yet received?</p> <p>5 A. I think I said if there are any more</p> <p>6 retailer documents that become available I would</p> <p>7 like to receive them.</p> <p>8 Q. Do you anticipate receiving any</p> <p>9 additional retailer records?</p> <p>10 A. I don't know whether I can anticipate</p> <p>11 or not.</p> <p>12 Q. In paragraph 7, the third item</p> <p>13 reflected there, "available market research</p> <p>14 data," did you review available market research</p> <p>15 data with respect to your opinion in this case?</p> <p>16 A. I often use that language as sort of a</p> <p>17 catchall for, you know, other things I might find</p> <p>18 independently or that may come from a third</p> <p>19 party.</p> <p>20 So, what I would describe is my review</p> <p>21 of some of the retailer websites in the way that</p> <p>22 we discussed earlier today, but I don't think I</p> <p>23 have other market research that has come into my</p> <p>24 possession that I'm relying upon.</p> <p>25 Q. So, when you state "available market</p> <p style="text-align: right;">101</p>	<p>1 WEIR</p> <p>2 don't think that plays in, per se, to the</p> <p>3 analysis that I've performed here, where I'm</p> <p>4 relying on the actual retail sales records.</p> <p>5 But, it was, again, underpinned my</p> <p>6 background research to get ready for my work on</p> <p>7 this case.</p> <p>8 Q. So, you reviewed pricing data on the</p> <p>9 websites reflected in that list of "Documents</p> <p>10 Reviewed"?</p> <p>11 A. Of course. Yes.</p> <p>12 Q. And did you utilize that pricing</p> <p>13 information in the analysis reflected in this</p> <p>14 report?</p> <p>15 A. No. I relied on the retail sales data</p> <p>16 that was produced in this litigation.</p> <p>17 Q. Any pricing information on those</p> <p>18 websites was not utilized by you, correct?</p> <p>19 A. Again, you keep mischaracterizing what</p> <p>20 I've said. I used it to form my background in</p> <p>21 this case before moving forward with an analysis</p> <p>22 of the actual retail sales data.</p> <p>23 Q. Paragraph 9 of your report states,</p> <p>24 "For the purposes of this precertification</p> <p>25 analysis," correct?</p> <p style="text-align: right;">103</p>
<p>1 WEIR</p> <p>2 research data," that is just a general category</p> <p>3 of information, correct?</p> <p>4 A. That in this case relates to my review</p> <p>5 of retailer websites and sort of the background</p> <p>6 research that we talked about earlier today.</p> <p>7 Q. So, other than your cursory review of</p> <p>8 the websites, you are not in possession of any</p> <p>9 market research data?</p> <p>10 A. I object to your characterization of</p> <p>11 my research as cursory, but I am not in</p> <p>12 possession of additional market research data</p> <p>13 above and beyond the background work that we just</p> <p>14 described on the record earlier today.</p> <p>15 Q. Did you perform any market research</p> <p>16 data other than any analysis that is reflected in</p> <p>17 this report?</p> <p>18 MR. ARISOHN: Object to form.</p> <p>19 THE WITNESS: I don't know how you can</p> <p>20 perform market research data.</p> <p>21 Q. Did you analyze any market research</p> <p>22 data other than the analysis reflected in this</p> <p>23 report?</p> <p>24 A. Again, I've looked at information such</p> <p>25 as pricing on the various retailer websites. I</p> <p style="text-align: right;">102</p>	<p>1 WEIR</p> <p>2 A. That's what it says in paragraph 9.</p> <p>3 Yes.</p> <p>4 Q. I'm imagining that's an error, a</p> <p>5 remnant of a prior analysis that you performed?</p> <p>6 A. I think that's right. Well, I think</p> <p>7 it was a remnant from the first report that I put</p> <p>8 in of which this was designed to reflect as</p> <p>9 closely as possible, but did not capture that</p> <p>10 temporal change in the state of the case.</p> <p>11 Q. And the remainder of paragraph 9, "I</p> <p>12 assumed a class period of April 20, 2011 through</p> <p>13 the present." Correct?</p> <p>14 A. Correct.</p> <p>15 Q. When you say "the present," is that</p> <p>16 October 31st, 2017?</p> <p>17 A. I think the date range would be</p> <p>18 ongoing through whatever litigation occurs. My</p> <p>19 analysis here is based upon the sales data that I</p> <p>20 had, which I think reflected, maybe, an end date</p> <p>21 of June 2016, but it would certainly be easy to</p> <p>22 basically gross up the sales to reflect the</p> <p>23 present date.</p> <p>24 The primary indicator that I wish to</p> <p>25 give here is in footnote 2, which is that,</p> <p style="text-align: right;">104</p>



<p>1 WEIR</p> <p>2 subject to whatever the court may determine is</p> <p>3 the appropriate timeframe, my analysis can be</p> <p>4 conducted to match that timeframe.</p> <p>5 Q. So, did counsel advise you what the</p> <p>6 relevant end date of the class period was?</p> <p>7 A. Yes.</p> <p>8 Q. And it is your understanding that the</p> <p>9 class period is ongoing?</p> <p>10 A. That's to the best of my</p> <p>11 understanding.</p> <p>12 Q. So, you were not advised that the</p> <p>13 class period ends in June of 2016?</p> <p>14 A. Again, now that you mention that, that</p> <p>15 may have been information that was given to me</p> <p>16 because that is the time period for which I</p> <p>17 analyzed the data.</p> <p>18 Q. Okay. But, so, when you say "through</p> <p>19 present," did you perform an analysis of data</p> <p>20 that postdates June of 2016?</p> <p>21 A. No.</p> <p>22 Q. Have you been provided, to your</p> <p>23 knowledge, with data regarding sales that</p> <p>24 postdates June of 2016?</p> <p>25 A. I don't know whether any of the sales</p> <p style="text-align: right;">105</p>	<p>1 WEIR</p> <p>2 So, the output that I report here</p> <p>3 should be in accordance with that June date.</p> <p>4 Q. It should be, but have you done</p> <p>5 anything to confirm that it does?</p> <p>6 A. Again, that's part of the work that I</p> <p>7 have done. It's my best intention for that to</p> <p>8 have been the case.</p> <p>9 Q. And I'm asking whether you took any</p> <p>10 steps to confirm that your analysis was limited</p> <p>11 to the appropriate class period.</p> <p>12 A. Yes. That's done in the analysis and</p> <p>13 the spreadsheet and the data files that I've used</p> <p>14 to generate my analysis.</p> <p>15 Q. So, it is your understanding that when</p> <p>16 you say "through present" and you state that your</p> <p>17 understanding was the class period was ongoing,</p> <p>18 that you, in fact, did go through these</p> <p>19 spreadsheets and confirm that you are not</p> <p>20 utilizing data from after June 15th of 2016?</p> <p>21 A. So, I think, again, if you will look</p> <p>22 at that paragraph, that paragraph is probably the</p> <p>23 same as was included in my March 16th, 2017</p> <p>24 Declaration, and at that point the class period</p> <p>25 would have been ongoing.</p> <p style="text-align: right;">107</p>
<p>1 WEIR</p> <p>2 data that I have obtained goes beyond that</p> <p>3 June 2016 date. It may be possible that it's</p> <p>4 available, but my analysis would tailor to the</p> <p>5 June 2016 date.</p> <p>6 Q. So, you may have been provided with</p> <p>7 data that postdates June of 2016?</p> <p>8 A. I just don't recall one way or the</p> <p>9 other.</p> <p>10 Q. Did you do anything to confirm that</p> <p>11 any data you received did not postdate June of</p> <p>12 2016?</p> <p>13 A. I guess maybe I don't understand your</p> <p>14 question. Are you asking did I do anything to</p> <p>15 make sure that the data I analyzed for purposes</p> <p>16 of the damages analysis went through June 2016 or</p> <p>17 are you saying did I just verify what was in the</p> <p>18 data?</p> <p>19 Q. I'm asking whether you confirmed that</p> <p>20 the data you were analyzing is data from the</p> <p>21 appropriate class period.</p> <p>22 A. So, again, I just don't recall whether</p> <p>23 the data that came into the report extends beyond</p> <p>24 June 15th, 2016, but the framework of analysis is</p> <p>25 supposed to terminate at June 15th, 2016.</p> <p style="text-align: right;">106</p>	<p>1 WEIR</p> <p>2 So, I think that language is maybe</p> <p>3 ill-suited for the time period at which this</p> <p>4 Declaration was filed, where, as I state down</p> <p>5 below, I calculated the total sales for the</p> <p>6 various classes from April 20th, 2011 through</p> <p>7 June 15th, 2016.</p> <p>8 Q. So, despite what is stated in</p> <p>9 paragraph 9, it is your understanding that any</p> <p>10 analysis and data set forth in this report would</p> <p>11 be for the class period of April 20th, 2011</p> <p>12 through June 15th of 2016?</p> <p>13 A. To the best of my understanding, yes.</p> <p>14 Q. Going down the report to paragraph 11:</p> <p>15 "I understand that Plaintiffs assert</p> <p>16 these products do not repel pests and are thus</p> <p>17 ineffective and worthless."</p> <p>18 Correct?</p> <p>19 A. That's my recitation of Plaintiffs'</p> <p>20 allegations.</p> <p>21 Q. And that, again, is based on your</p> <p>22 reading of the Complaint and the representations</p> <p>23 of counsel, correct?</p> <p>24 A. Correct.</p> <p>25 Q. Paragraph 12, you state:</p> <p style="text-align: right;">108</p>





<p>1 WEIR</p> <p>2 "As such, this litigation calls for</p> <p>3 calculation of full compensatory damages."</p> <p>4 Correct?</p> <p>5 A. Yes.</p> <p>6 Q. And again, did you do any independent</p> <p>7 analysis to determine that this litigation calls</p> <p>8 for full compensatory damages?</p> <p>9 A. Yes. I did all the background</p> <p>10 research that we talked about, I gave great</p> <p>11 thought to Plaintiffs' Complaint and theory of</p> <p>12 liability.</p> <p>13 I reviewed the reference manual on</p> <p>14 scientific evidence to make sure that I was</p> <p>15 correct that the first step that you should</p> <p>16 undertake in a damages analysis is to assume that</p> <p>17 Plaintiffs established their theory of liability.</p> <p>18 I went through and looked at the sales</p> <p>19 data. I then made a determination as to the</p> <p>20 market value based upon price of the ancillary</p> <p>21 features and determined that there was no such</p> <p>22 value.</p> <p>23 And all of that together is the work</p> <p>24 that I did to determine that the full</p> <p>25 compensatory damages is the correct framework of</p> <p>109</p>	<p>1 WEIR</p> <p>2 that you had received and reviewed information</p> <p>3 from five retailers, it would not be your</p> <p>4 expectation that that would be incorrect?</p> <p>5 A. It's correct as of the time of this</p> <p>6 Declaration.</p> <p>7 Q. Did you perform an analysis of those</p> <p>8 sales figures to determine the percentage of</p> <p>9 sales that they consisted of?</p> <p>10 A. I looked at the total number of units</p> <p>11 within that data set, which was 1.8 million and</p> <p>12 change, and compared that to the wholesale sales</p> <p>13 on a nationwide basis, which was, I think,</p> <p>14 2.5 million, and the back-of-the-envelope math is</p> <p>15 plus or minus 70 percent.</p> <p>16 Q. So, other than that arithmetic, did</p> <p>17 you perform any other analysis to determine</p> <p>18 whether these were representative retailers with</p> <p>19 respect to sales of Bell &amp; Howell pest repellers?</p> <p>20 A. Statistically, having a sample of more</p> <p>21 than 70 percent of the target universe is well</p> <p>22 more than representative. So, I need not have</p> <p>23 conducted any additional analysis.</p> <p>24 Subsequently I've confirmed that that</p> <p>25 analysis was correct by looking at the additional</p> <p>111</p>
<p>1 WEIR</p> <p>2 damages for this case pursuant to Plaintiffs'</p> <p>3 stated theory of liability.</p> <p>4 Q. So, again, that is based on your</p> <p>5 understanding of Plaintiffs' asserted theory of</p> <p>6 liability, correct?</p> <p>7 A. It is. Yes. Amongst all the work</p> <p>8 that I did.</p> <p>9 Q. And that work would be reflected in</p> <p>10 this report, correct?</p> <p>11 A. Yes. And in the conversations that</p> <p>12 we've had today.</p> <p>13 Q. Going down, we have paragraph 13. So,</p> <p>14 as we discussed earlier, at this point you had</p> <p>15 received retail sales data for five retailers,</p> <p>16 correct?</p> <p>17 A. That's the best of my recollection,</p> <p>18 based on a review of my report. And it's my</p> <p>19 memory that they comprised something like</p> <p>20 70 percent of the retail sales.</p> <p>21 Q. And it's your understanding that this</p> <p>22 report is correct, correct?</p> <p>23 A. It's my intention for it to be</p> <p>24 correct.</p> <p>25 Q. So, to the extent that this states</p> <p>110</p>	<p>1 WEIR</p> <p>2 retail sales data that shows that my calculations</p> <p>3 in this report are accurate and, if anything, are</p> <p>4 conservative.</p> <p>5 Q. But, you have not, as of the date of</p> <p>6 this deposition, you have not supplemented this</p> <p>7 report in any way, correct?</p> <p>8 A. I don't believe I've issued a</p> <p>9 supplement to this report as of this date.</p> <p>10 Q. In your report you state that you</p> <p>11 utilized wholesale data from Bell &amp; Howell,</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. You agree that wholesale sales are</p> <p>15 different than retail sales, correct?</p> <p>16 A. In what context?</p> <p>17 Q. Not every repeller that is sold to a</p> <p>18 retailer is sold to a customer, correct?</p> <p>19 A. One would have an expectation that</p> <p>20 those amounts would be very close to one another,</p> <p>21 especially when you're analyzing net wholesale</p> <p>22 sales net of returns.</p> <p>23 So, again, we have a strong</p> <p>24 expectation and understanding based upon the</p> <p>25 experience that Walmart doesn't buy 200,000 units</p> <p>112</p>





<p>1 WEIR</p> <p>2 to put them in a warehouse and not sell them.</p> <p>3 Walmart is buying these units at wholesale to</p> <p>4 sell them.</p> <p>5 Q. Did you do any analysis to confirm the</p> <p>6 relationship between wholesale and retail sales</p> <p>7 with respect to Bell &amp; Howell repellers?</p> <p>8 A. Yes.</p> <p>9 Q. And where is that analysis reflected</p> <p>10 in your report?</p> <p>11 A. I don't know that it's reflected in</p> <p>12 the report. It's reflected in my work papers,</p> <p>13 where we've compared the wholesale and retail</p> <p>14 data from individual retailers and the retailers</p> <p>15 identified in the wholesale data.</p> <p>16 Q. So, it's your understanding that there</p> <p>17 are work papers that reflect your analysis of the</p> <p>18 comparison between wholesales and retail sales in</p> <p>19 this case?</p> <p>20 A. Yes.</p> <p>21 Q. And it's your understanding that those</p> <p>22 documents would have been produced with respect</p> <p>23 to that subpoena?</p> <p>24 A. They were produced by me. Whether</p> <p>25 they've been produced to you, I can't speak to</p> <p style="text-align: right;">113</p>	<p>1 WEIR</p> <p>2 wholesale and retail data.</p> <p>3 Q. And when you say "pairing," what do</p> <p>4 you mean?</p> <p>5 A. We sold 200,000 units to Walmart,</p> <p>6 Walmart retail sales. We sold 200,000 units at</p> <p>7 retail.</p> <p>8 When you see that relationship, we</p> <p>9 understand that there's a direct translation</p> <p>10 between the number of net wholesale units, net of</p> <p>11 returns that are sold to retailers, that are then</p> <p>12 sold on by those retailers to their customers.</p> <p>13 Q. And you perform that analysis with</p> <p>14 respect to each of the retailers for which you</p> <p>15 have received retail sales information?</p> <p>16 A. I would have to go back and review to</p> <p>17 know whether I did that for every retailer, but I</p> <p>18 know that I did it for a sufficient quantity of</p> <p>19 data to satisfy myself that the wholesale data</p> <p>20 units on a net basis could be used as a proxy for</p> <p>21 total retail sales during the class period.</p> <p>22 Q. So, you received retail sales for five</p> <p>23 retailers, correct?</p> <p>24 A. Comprising some 70 percent of the</p> <p>25 market.</p> <p style="text-align: right;">115</p>
<p>1 WEIR</p> <p>2 that.</p> <p>3 Q. And those documents, would they be</p> <p>4 spreadsheets?</p> <p>5 A. They would either be spreadsheets or</p> <p>6 Stata files.</p> <p>7 Q. And those would specifically reflect</p> <p>8 the relationship between wholesale and retail</p> <p>9 sales in this case?</p> <p>10 A. It would be a pairing of the wholesale</p> <p>11 and retail data. The spreadsheet may do other</p> <p>12 things, as well. So, it might require a nuanced</p> <p>13 eye to understand where in the spreadsheet that</p> <p>14 information lies.</p> <p>15 But, that information confirms the</p> <p>16 strong relationship between the number of units</p> <p>17 sold at wholesale and the number of units sold at</p> <p>18 retail through the specific retailers.</p> <p>19 Q. Did you quantify that relationship</p> <p>20 between the wholesale and retail sales?</p> <p>21 A. I guess I don't quite follow.</p> <p>22 Q. You state that that information is set</p> <p>23 forth in the spreadsheets. Did you perform that</p> <p>24 analysis?</p> <p>25 A. Yes. There's a pairing of the</p> <p style="text-align: right;">114</p>	<p>1 WEIR</p> <p>2 Q. And you're not certain whether you</p> <p>3 performed this spreadsheet analysis of all five</p> <p>4 of those retailers?</p> <p>5 A. Again, this is going back nine months</p> <p>6 to a year. So, as I sit here today, I don't</p> <p>7 recollect whether I did it for all five retailers</p> <p>8 or whether I did it for a sample of the</p> <p>9 retailers. I just don't recall as I sit here</p> <p>10 today.</p> <p>11 Q. So, you believe that it is possible</p> <p>12 that you were unable -- that you chose not to</p> <p>13 perform an analysis of those numbers with respect</p> <p>14 to one of the five retailers that you received</p> <p>15 information for?</p> <p>16 A. It's possible that I analyzed the data</p> <p>17 for all five retailers. It's also possible that</p> <p>18 I analyzed sufficient data to cause me to</p> <p>19 believe, from a perspective of statistics, that</p> <p>20 it was unnecessary to conduct further evaluation.</p> <p>21 I just don't recall as I sit here today.</p> <p>22 Q. So, it is your understanding, from</p> <p>23 your analysis of those records, that every item</p> <p>24 that was wholesale to these retailers was then</p> <p>25 sold to the public?</p> <p style="text-align: right;">116</p>



<p>1 <b>WEIR</b></p> <p>2 A. On a statistical basis, yes.</p> <p>3 <b>Q. Well, with respect to the five</b></p> <p>4 <b>retailers that you received, you could determine</b></p> <p>5 <b>that on a specific basis, correct?</b></p> <p>6 A. I guess I don't understand. I was</p> <p>7 looking at this from a statistical basis, which</p> <p>8 is to understand, is it acceptable to use the</p> <p>9 wholesale data as a proxy for the number of units</p> <p>10 sold at retail? I made the determination that it</p> <p>11 was and then used the data that way.</p> <p>12 <b>Q. And I'm asking, with respect to the</b></p> <p>13 <b>five retailers which you received data, would you</b></p> <p>14 <b>have needed to use a statistical proxy for that</b></p> <p>15 <b>ratio?</b></p> <p>16 A. I think you're misunderstanding. I</p> <p>17 conducted an analysis that shows that the retail</p> <p>18 data is reflected in the wholesale data and that</p> <p>19 I feel comfortable using the wholesale data on a</p> <p>20 statistical basis as an analysis for the class.</p> <p>21 <b>Q. And my question is, with respect to</b></p> <p>22 <b>Dr. Leonard's, for an example, could you not</b></p> <p>23 <b>determine from the records you had what</b></p> <p>24 <b>percentage of items that were wholesale to</b></p> <p>25 <b>Dr. Leonard's were ultimately sold to the public</b></p> <p style="text-align: right;">117</p>	<p>1 <b>WEIR</b></p> <p>2 then, the additional retail data that we have</p> <p>3 comprises an even larger fraction of that.</p> <p>4 So, we're getting near having</p> <p>5 100 percent of the retail data that matches and</p> <p>6 reflects the quantity of the wholesale data.</p> <p>7 <b>Q. And again, I'm asking you, where in</b></p> <p>8 <b>this report have you provided your analysis that</b></p> <p>9 <b>reflects that all of the wholesale --</b></p> <p>10 MR. ARISOHN: Objection, asked and</p> <p>11 answered. And I object to form.</p> <p>12 THE WITNESS: What I'm telling you is</p> <p>13 that I satisfied myself with the</p> <p>14 relationship and then used the wholesale</p> <p>15 data as I believe is statistically</p> <p>16 appropriate, for example, in Table 1.</p> <p>17 So, that is one area where the</p> <p>18 analysis -- the end results of that analysis</p> <p>19 are shown.</p> <p>20 <b>Q. If you had documentation that reflects</b></p> <p>21 <b>that a certain number of items were wholesale to</b></p> <p>22 <b>a retailer and that those were different than the</b></p> <p>23 <b>retail sales figures, would you take that into</b></p> <p>24 <b>account in conducting your analysis?</b></p> <p>25 A. That's far too vague of a</p> <p style="text-align: right;">119</p>
<p>1 <b>WEIR</b></p> <p>2 <b>as retail sales?</b></p> <p>3 A. I was able to determine that,</p> <p>4 statistically speaking, all of the wholesale</p> <p>5 sales were sold to the public by Dr. Leonard's.</p> <p>6 <b>Q. Did you do that specific analysis with</b></p> <p>7 <b>respect to Dr. Leonard's?</b></p> <p>8 A. What I said before is, I can't</p> <p>9 remember for the specific retailer, but I did it</p> <p>10 sufficiently amongst the five retailers to</p> <p>11 satisfy myself that that relationship existed and</p> <p>12 that the use of the wholesale sales on a net</p> <p>13 basis would be a reasonable proxy of the retail</p> <p>14 sales to the class.</p> <p>15 That information has been confirmed by</p> <p>16 the subsequent retail data that's been produced.</p> <p>17 <b>Q. So, with respect to any subsequent</b></p> <p>18 <b>data, you have performed an analysis of the</b></p> <p>19 <b>wholesale data compared to the retail sales data?</b></p> <p>20 A. What I've understood is the nature of</p> <p>21 the total marketplace and the nature of the</p> <p>22 amount of the marketplace for which I have total</p> <p>23 sales data.</p> <p>24 So, these five retailers alone</p> <p>25 comprise 70 percent of the wholesale sales, and</p> <p style="text-align: right;">118</p>	<p>1 <b>WEIR</b></p> <p>2 hypothetical. I would need to understand the</p> <p>3 facts and circumstances to understand what I</p> <p>4 might do to the analysis.</p> <p>5 <b>Q. And it's your understanding that the</b></p> <p>6 <b>documents that you produced reflect an analysis</b></p> <p>7 <b>of the percentage of items that were wholesaled</b></p> <p>8 <b>to the retailer that were then sold to the</b></p> <p>9 <b>public?</b></p> <p>10 A. I don't know that it calculates a</p> <p>11 percentage, but it compares the wholesales sales</p> <p>12 and the retail sales in a way that allowed me to</p> <p>13 satisfy myself that there is a direct</p> <p>14 relationship between the wholesale sales on a net</p> <p>15 basis and the retail sales, and that, on an</p> <p>16 aggregate basis for the class, the use of the net</p> <p>17 wholesale sales for the number of units is a</p> <p>18 reasonable proxy for the total retail sales in</p> <p>19 the marketplace.</p> <p>20 <b>Q. But, you don't recall whether you did</b></p> <p>21 <b>a individual analysis of each the retailers for</b></p> <p>22 <b>which you had the full information for which you</b></p> <p>23 <b>could form that analysis?</b></p> <p>24 MR. ARISOHN: Objection. Asked and</p> <p>25 answered.</p> <p style="text-align: right;">120</p>



<p>1 WEIR</p> <p>2 THE WITNESS: I've looked at many of</p> <p>3 the retailers, it's very possibly I've</p> <p>4 looked at all of them.</p> <p>5 But, this is work that I did a year</p> <p>6 ago and so, as I sit here today, I don't</p> <p>7 have a precise recollection of the exact</p> <p>8 quantity of retail data that I compared to</p> <p>9 the wholesale data, except that is was</p> <p>10 sufficient, from a statistical standpoint,</p> <p>11 to give me the comfort that using the net</p> <p>12 wholesale units would be statistically</p> <p>13 appropriate for the determination of damages</p> <p>14 in this case.</p> <p>15 Q. And to the extent that any of the</p> <p>16 retailers were inconsistent with that, your</p> <p>17 statistical finding, would you have incorporated</p> <p>18 that information in your analysis?</p> <p>19 A. Inconsistent in what way?</p> <p>20 Q. As I stated, for a specific retailer,</p> <p>21 the relationship between wholesale and retail</p> <p>22 sales was not 100 percent?</p> <p>23 A. In what way?</p> <p>24 Q. If a retailer had purchased,</p> <p>25 wholesale, a number of items and the retail sales</p> <p>121</p>	<p>1 WEIR</p> <p>2 characterization of what my analysis involved,</p> <p>3 but I did determine the number of units sold and</p> <p>4 I also determined typical or average prices per</p> <p>5 unit.</p> <p>6 Q. So, if you look at your report, the</p> <p>7 damages that you ultimately calculated or</p> <p>8 estimated involve two components; one being the</p> <p>9 wholesale numbers that we discussed and the other</p> <p>10 being a retail price that you estimated, correct?</p> <p>11 A. Again, that's where you ultimately get</p> <p>12 to. There's a lot of work that went into making</p> <p>13 a determination that the wholesale units were</p> <p>14 appropriate as to what the retail prices are, the</p> <p>15 correct apportionment between states.</p> <p>16 But, ultimately the damages are</p> <p>17 calculated by looking at the number of units and</p> <p>18 the typical average price per unit.</p> <p>19 Q. And again, the work with regard to the</p> <p>20 wholesale units, that is encompassed entirely in</p> <p>21 those spreadsheets that you have provided?</p> <p>22 A. In my work papers. Correct.</p> <p>23 Q. There's nothing in this report that</p> <p>24 specifically states what you did with respect to</p> <p>25 the wholesale numbers and the retail numbers?</p> <p>123</p>
<p>1 WEIR</p> <p>2 did not equal that number of items, would you</p> <p>3 have taken that into account in your analysis?</p> <p>4 A. Again, that's not sufficient</p> <p>5 information for me to understand what's going on.</p> <p>6 Are we talking about temporally</p> <p>7 matching these sales data? Are we talking about</p> <p>8 understanding sales to a particular area?</p> <p>9 Again, all I can say is, the research</p> <p>10 that I have done has satisfied me that, from a</p> <p>11 statistical perspective, the net wholesale sales</p> <p>12 are at reasonable proxy for the total units sold</p> <p>13 at retail on a nationwide basis, and then as</p> <p>14 apportioned on a state-by-state basis for the</p> <p>15 multistate class or California.</p> <p>16 Q. With respect to the nationwide class</p> <p>17 or, I guess, all these classes, you then</p> <p>18 conducted some analyses to determine the retail</p> <p>19 pricing, correct?</p> <p>20 A. would you just ask that question</p> <p>21 again, please?</p> <p>22 Q. So, your analysis involved two</p> <p>23 components, it would be the number of items that</p> <p>24 were sold and the retail price, correct?</p> <p>25 A. I don't know if I'll accept that</p> <p>122</p>	<p>1 WEIR</p> <p>2 MR. ARISOHN: Object to form.</p> <p>3 THE WITNESS: I think I described how</p> <p>4 I use both the wholesale and retail data in</p> <p>5 this case.</p> <p>6 As to the specifics of satisfying</p> <p>7 myself that the wholesale data is a</p> <p>8 reasonable proxy for the total retail sales</p> <p>9 on a nationwide basis or as apportioned by</p> <p>10 state, I think that work is reflected in the</p> <p>11 work papers.</p> <p>12 Q. When you say that you satisfied</p> <p>13 yourself, is there a specific standard that you</p> <p>14 used in that regard?</p> <p>15 A. It would be looking at the comparison</p> <p>16 of the total retail sales and total wholesale</p> <p>17 sales and understanding the issues of the ongoing</p> <p>18 nature of ongoing retail sales and ongoing</p> <p>19 wholesale sales to these particular retailers.</p> <p>20 It's also understanding the total</p> <p>21 universe of the retail sales that we have</p> <p>22 already.</p> <p>23 So, if we were talking about a sample</p> <p>24 of retail sales that were one percent of the</p> <p>25 total of wholesale, it might be something</p> <p>124</p>



<p>1 WEIR</p> <p>2 different than when I have 70 percent of the</p> <p>3 entire marketplace already.</p> <p>4 Q. When you say, "the understanding of</p> <p>5 the ongoing nature of the business," what did you</p> <p>6 do to analyze the nature of these sales?</p> <p>7 A. I don't follow that question.</p> <p>8 Q. You gave a number of factors that you</p> <p>9 looked at with regard to this wholesale versus</p> <p>10 retail. Where is that reflected in this report</p> <p>11 and/or your work papers?</p> <p>12 MR. ARISOHN: Objection. Asked and</p> <p>13 answered.</p> <p>14 THE WITNESS: It is reflected in the</p> <p>15 work papers and it's reflected in my use of</p> <p>16 the wholesale data as one of the inputs in</p> <p>17 my calculations throughout the report.</p> <p>18 And the report speaks for itself as to</p> <p>19 the description of how I have used the</p> <p>20 wholesale and retail data.</p> <p>21 Q. It discusses how you used the</p> <p>22 wholesale and retail data. I'm asking for the</p> <p>23 basis for your use of the wholesale data. Where</p> <p>24 is that reflected in the report?</p> <p>25 A. So, that's reflected in the report</p> <p style="text-align: right;">125</p>	<p>1 WEIR</p> <p>2 that you've discussed, you received records with</p> <p>3 respect to the number of items that were</p> <p>4 wholesaled by Bell &amp; Howell to those specific</p> <p>5 retailers, correct?</p> <p>6 A. That's my best recollection.</p> <p>7 Q. And you received, to your</p> <p>8 understanding, information reflecting the retail</p> <p>9 sales of those repellers, correct?</p> <p>10 A. For the retailers for which I received</p> <p>11 data, yes.</p> <p>12 Q. So, whether or not they consisted of</p> <p>13 70 percent of the total wholesales of the</p> <p>14 devices, did you do a specific analysis of each</p> <p>15 of these retailers to determine whether or not</p> <p>16 each of these retailers had sold 100 percent of</p> <p>17 the items that were wholesaled to them?</p> <p>18 A. You've asked that question a hundred</p> <p>19 times now and the answer is yes. And it's</p> <p>20 reflected in my work papers and it's done on a</p> <p>21 statistical basis, understanding that the data is</p> <p>22 never going to line up exactly, but it's</p> <p>23 reflective of the wholesale data matching the</p> <p>24 retail data.</p> <p>25 Q. And that analysis that you state that</p> <p style="text-align: right;">127</p>
<p>1 WEIR</p> <p>2 where I discuss my 14 years of experience, my</p> <p>3 educational background, my review of the</p> <p>4 documentary evidence in the case and within the</p> <p>5 work papers where I do the research to satisfy</p> <p>6 myself that the wholesale data, on a net basis,</p> <p>7 is a reasonable proxy for the retail data in this</p> <p>8 case.</p> <p>9 Q. And in that regard, is there a</p> <p>10 specific standard that you utilized to determine</p> <p>11 that that was appropriate, other than your own</p> <p>12 subjective, whether or not you were satisfied,</p> <p>13 standard?</p> <p>14 A. I don't agree that it was a subjective</p> <p>15 evaluation in any way and don't accept your</p> <p>16 characterization.</p> <p>17 Q. What was the objective standard that</p> <p>18 you used?</p> <p>19 A. A comparison of the retail and</p> <p>20 wholesale sales and understanding that the retail</p> <p>21 sales that I had already represented 70 percent</p> <p>22 of the wholesale sales that Bell &amp; Howell claims</p> <p>23 are the totality of the sales of the products at</p> <p>24 issue in the case.</p> <p>25 Q. With respect to the specific retailers</p> <p style="text-align: right;">126</p>	<p>1 WEIR</p> <p>2 you have performed, is that reflected in your</p> <p>3 report, other than the fact that you used the</p> <p>4 wholesale numbers? Do you discuss the method</p> <p>5 that you used in this report anywhere?</p> <p>6 A. It's reflected in the work papers, not</p> <p>7 in the report.</p> <p>8 Q. And the work papers being spreadsheets</p> <p>9 of sales data?</p> <p>10 A. And Stata analysis.</p> <p>11 Q. When you say "Stata analysis," what do</p> <p>12 you mean by that?</p> <p>13 A. Stata is a statistical software</p> <p>14 program. So, some of our research was done in</p> <p>15 Microsoft Excel and some of my research was done</p> <p>16 in Stata.</p> <p>17 Q. And what type of analysis did you</p> <p>18 perform with Stata?</p> <p>19 A. Well, there were many analyses</p> <p>20 performed with Stata, but the subject of this</p> <p>21 inquiry has been a comparison of the wholesale</p> <p>22 and retail sales data.</p> <p>23 Q. And did you receive an output with</p> <p>24 respect to that analysis?</p> <p>25 A. The Stata output appears on the</p> <p style="text-align: right;">128</p>





<p>1 WEIR</p> <p>2 screen. So, I probably saw something on the</p> <p>3 screen. Yes.</p> <p>4 <b>Q. Did you document that output in any</b></p> <p>5 <b>way?</b></p> <p>6 A. Again, now we're going back nine</p> <p>7 months. So, I don't recall whether there's a log</p> <p>8 of that output or not.</p> <p>9 <b>Q. I mean, is that output reflected</b></p> <p>10 <b>anywhere in your report?</b></p> <p>11 A. Is it reflected in the report? It's</p> <p>12 reflected, again, in my choice and use of the</p> <p>13 wholesale sales data as a proxy for retail sales</p> <p>14 data.</p> <p>15 <b>Q. But, do you discuss the mechanism of</b></p> <p>16 <b>that analysis anywhere in the report or the</b></p> <p>17 <b>results of that analysis, other than just purely</b></p> <p>18 <b>the fact that you used the wholesale data?</b></p> <p>19 A. Again, I reference my experience, my</p> <p>20 on-the-job experience, my educational background</p> <p>21 as the basis for my being able to analyze and</p> <p>22 understand the reasonableness of the use of</p> <p>23 wholesale data. The mechanics of the analysis</p> <p>24 that I used to satisfy myself are contained</p> <p>25 within the work papers.</p> <p style="text-align: right;">129</p>	<p>1 WEIR</p> <p>2 in this case based upon a comparison of the</p> <p>3 wholesale and retail sales data.</p> <p>4 I did not need to conduct additional</p> <p>5 independent research, because I bring to bear</p> <p>6 tremendous expertise, having done this exact same</p> <p>7 type of thing on numerous occasions.</p> <p>8 <b>Q. So, the answer is, no, you did not,</b></p> <p>9 <b>correct? You did not perform any other specific</b></p> <p>10 <b>investigation with regard to this case?</b></p> <p>11 A. My fulsome answer is as I just gave</p> <p>12 it.</p> <p>13 <b>Q. With respect to the nationwide retail</b></p> <p>14 <b>price, for some of the items you were able to</b></p> <p>15 <b>perform an analysis to determine what you believe</b></p> <p>16 <b>to be a specific retail price for those items,</b></p> <p>17 <b>correct?</b></p> <p>18 A. Average retail price.</p> <p>19 <b>Q. What do you mean when you say "average</b></p> <p>20 <b>retail price"?</b></p> <p>21 A. Well, you said "specific retail</p> <p>22 price." And "specific retail price" could be any</p> <p>23 one thing at any given time.</p> <p>24 But, I'm talking about a class-wide</p> <p>25 average retail price that is reflective in the</p> <p style="text-align: right;">131</p>
<p>1 WEIR</p> <p>2 <b>Q. Did you do any research, outside of a</b></p> <p>3 <b>analysis to the data, to confirm that the</b></p> <p>4 <b>wholesale figures were a reasonable proxy for</b></p> <p>5 <b>retail sales?</b></p> <p>6 A. Again, that's something where I bring</p> <p>7 my 14 years of experience to bear, where, in</p> <p>8 many, many cases, litigations and otherwise,</p> <p>9 wholesale sales on a net of returns basis are</p> <p>10 used as a proxy for the totality of retail sales</p> <p>11 absent evidence to the contrary, and that's</p> <p>12 standard practice.</p> <p>13 <b>Q. Is that standard practice documented</b></p> <p>14 <b>anywhere?</b></p> <p>15 A. I think you could probably find a</p> <p>16 hundred different studies that base their</p> <p>17 analysis on the wholesale data.</p> <p>18 <b>Q. Did you do any further investigation,</b></p> <p>19 <b>specific to this case, other than your analysis</b></p> <p>20 <b>of the data to determine that wholesale figures</b></p> <p>21 <b>were an appropriate proxy for retail?</b></p> <p>22 A. That's a great "Other than that,</p> <p>23 Mrs. Lincoln, how was the theater" type of</p> <p>24 question.</p> <p>25 But, what I did was to satisfy myself</p> <p style="text-align: right;">130</p>	<p>1 WEIR</p> <p>2 aggregate of the retail price paid for the</p> <p>3 specific products.</p> <p>4 <b>Q. I suppose I meant specific to the</b></p> <p>5 <b>product. You were able to determine an average</b></p> <p>6 <b>retail price specific to that product, correct?</b></p> <p>7 A. For some of the products. Correct.</p> <p>8 <b>Q. And for those products, how did you</b></p> <p>9 <b>determine that average retail price?</b></p> <p>10 A. That was based on an analysis of the</p> <p>11 available retail sales data from the five</p> <p>12 retailers, where it was possible to break apart</p> <p>13 the retail sales data into specific Bell &amp; Howell</p> <p>14 SKUs.</p> <p>15 <b>Q. Did you receive monetary sales data</b></p> <p>16 <b>for each of the five retailers?</b></p> <p>17 A. As I sit here today, my recollection</p> <p>18 is, yes. But, it's possible that we did not</p> <p>19 receive monetary sales from one of the retailers.</p> <p>20 <b>Q. Is it possible that you didn't receive</b></p> <p>21 <b>monetary sales for more than one of the</b></p> <p>22 <b>retailers?</b></p> <p>23 A. Again, I don't have a precise</p> <p>24 recollection, so, I can't testify one way or the</p> <p>25 other, as I sit here today.</p> <p style="text-align: right;">132</p>





<p>1 WEIR</p> <p>2 Q. In preparing for this deposition, did</p> <p>3 you review your report in this case?</p> <p>4 A. I did review the report. Yes.</p> <p>5 Q. Did you review your file with respect</p> <p>6 to this case?</p> <p>7 A. No.</p> <p>8 Q. Did you review any other documents</p> <p>9 other than your report?</p> <p>10 A. I looked through Mr. Boedeker's</p> <p>11 report. I reviewed the deposition notice, I</p> <p>12 reviewed the Complaint in the case.</p> <p>13 Q. You did not review any of your prior</p> <p>14 work with respect to the analysis in this report?</p> <p>15 A. I read my March 2017 Declaration. I</p> <p>16 did not go back and review the voluminous work</p> <p>17 papers that had been produced in the case.</p> <p>18 Q. With respect to the items for which</p> <p>19 you were able to make a determination of average</p> <p>20 retail price, did you do any analysis of whether</p> <p>21 the prices for those retailers were</p> <p>22 representative of the prices in the market?</p> <p>23 A. Yes.</p> <p>24 Q. And what was that analysis?</p> <p>25 A. It was based on the totality of the</p> <p style="text-align: right;">133</p>	<p>1 WEIR</p> <p>2 Q. I mean, this report reflects your</p> <p>3 opinions in this case, correct?</p> <p>4 A. It reflects my opinions in the case as</p> <p>5 of the date of the report.</p> <p>6 Q. As of the date of the report. And</p> <p>7 there's nothing in here that states that you did</p> <p>8 an analysis of the prices as between -- a</p> <p>9 comparison between the retailers, correct?</p> <p>10 A. I mean, I think it discusses that I</p> <p>11 analyzed the sales data from the retailers. As</p> <p>12 to the specifics of what is contained in that</p> <p>13 analysis, you would need to look at the work</p> <p>14 papers that contain that voluminous detail.</p> <p>15 Q. And the work paper that you discuss</p> <p>16 are spreadsheets of the data, correct?</p> <p>17 A. They are spreadsheets that contain</p> <p>18 data, they are spreadsheets that contain</p> <p>19 analyses, they are Stata files that contain</p> <p>20 analyses as well as data.</p> <p>21 Q. To the extent that the Stata files</p> <p>22 contain analysis, is that analysis documented</p> <p>23 other than in the Stata system?</p> <p>24 A. I mean, they're Stata files, so they</p> <p>25 are documented within state. That would be</p> <p style="text-align: right;">135</p>
<p>1 WEIR</p> <p>2 pricing data that we received as a fraction of</p> <p>3 the total sample of sales that we were analyzing.</p> <p>4 And subsequent to that, where we have</p> <p>5 received additional data, we have confirmed that</p> <p>6 the dollar sales that are contained in this</p> <p>7 October 31st, 2017 Declaration are indeed</p> <p>8 accurate representations of the total sales on a</p> <p>9 class-wide basis or are inherently conservative.</p> <p>10 Q. I'm not asking you to testify to</p> <p>11 anything subsequent.</p> <p>12 You drafted this report as of October</p> <p>13 of 2017, correct?</p> <p>14 A. Correct.</p> <p>15 Q. As of the date that you drafted this</p> <p>16 report, did you do any analysis of the retail</p> <p>17 pricing for the units between retailers?</p> <p>18 A. I believe we did conduct comparisons</p> <p>19 as between retailers.</p> <p>20 Q. You believe that you did?</p> <p>21 A. I believe that we did.</p> <p>22 Q. Is this analysis reflected anywhere in</p> <p>23 this report?</p> <p>24 A. It is likely reflected in the work</p> <p>25 papers that analyze the retail-specific data.</p> <p style="text-align: right;">134</p>	<p>1 WEIR</p> <p>2 asking, like, if I could put the computer code</p> <p>3 from Microsoft Excel into the report, which,</p> <p>4 obviously you can't do.</p> <p>5 Q. Based on your analysis of the retail</p> <p>6 pricing between retailers, was there a difference</p> <p>7 between retail pricing as between the different</p> <p>8 retailers?</p> <p>9 A. So, if you understand the retail sales</p> <p>10 in the aggregate, the difference in price between</p> <p>11 retailers does not matter in terms of</p> <p>12 understanding class-wide damages.</p> <p>13 But, as long as you understand that</p> <p>14 caveat, there are some differences between the</p> <p>15 prices charged for certain products as between</p> <p>16 different retailers, but, in the aggregate, the</p> <p>17 sales data reflects all of those difference</p> <p>18 prices in the averages that are used.</p> <p>19 And those -- any such differences are</p> <p>20 accounted for in the analysis that I set forth in</p> <p>21 my Declaration.</p> <p>22 Q. For any retailers that you have not</p> <p>23 received your retail sales information, you have</p> <p>24 no information as far as what their retail</p> <p>25 pricing was, correct?</p> <p style="text-align: right;">136</p>



<p>1 <b>WEIR</b></p> <p>2 A. That's not quite right. Part of my</p> <p>3 understanding of the retail sales data here</p> <p>4 reflects the particular retailers that we have</p> <p>5 and it is confirmed that those retail prices tend</p> <p>6 to be lower than the prices that we do not have,</p> <p>7 as of the date of this report.</p> <p>8 <b>Q. As of the date of this report, for any</b></p> <p>9 <b>retailers for which you didn't have information</b></p> <p>10 <b>you didn't have that information, correct?</b></p> <p>11 A. Well, you say that as if that means I</p> <p>12 don't know anything about the retailers that we</p> <p>13 had or the retailers that we didn't have.</p> <p>14 But, for example, I have sales data</p> <p>15 from walmart and we all know that walmart is a</p> <p>16 historically low-priced retailer.</p> <p>17 So, where I'm using data from walmart,</p> <p>18 I know that that's going to understate the</p> <p>19 market-wide average price for these repellers and</p> <p>20 that, if we have another retailer, it is highly</p> <p>21 likely that those price points would be even</p> <p>22 higher than those ones that we have from walmart.</p> <p>23 So, I had a good sense from the</p> <p>24 analysis that I did -- and this is going back to</p> <p>25 the background of understanding the retailers.</p> <p>137</p>	<p>1 <b>WEIR</b></p> <p>2 don't recollect this precise document in this</p> <p>3 format.</p> <p>4 <b>Q. If I represent to you that this is a</b></p> <p>5 <b>spreadsheet that was produced in response to that</b></p> <p>6 <b>subpoena that purports to be walmart sales data,</b></p> <p>7 <b>would that help your recollection?</b></p> <p>8 A. Well, it's clearly sales data, but I</p> <p>9 would have to accept your representation. I</p> <p>10 don't see any indicia here that this is walmart</p> <p>11 versus some other retailer without, again, going</p> <p>12 back to the original file.</p> <p>13 <b>Q. With respect to the work papers that</b></p> <p>14 <b>you've discussed, does this appear consistent</b></p> <p>15 <b>with those work papers as you've discussed them?</b></p> <p>16 A. This looks like it would be consistent</p> <p>17 with the raw data that would be used in a work</p> <p>18 paper to analyze the data. I don't see anything</p> <p>19 here that analyzes the data.</p> <p>20 So, again, this, whether it's walmart</p> <p>21 or somebody else, looks to be raw retail sales</p> <p>22 data. The work papers that I'm referring to</p> <p>23 would take this type of data and then analyze it.</p> <p>24 <b>Q. Okay. So, as part of your work in</b></p> <p>25 <b>this case, you received raw data from counsel</b></p> <p>139</p>
<p>1 <b>WEIR</b></p> <p>2 The background research that I did</p> <p>3 gives me confidence to understand that the</p> <p>4 average prices that I used here are either</p> <p>5 representative of the marketplace or conservative</p> <p>6 representations of the marketplace.</p> <p>7 <b>Q. Did you do any specific analysis to</b></p> <p>8 <b>determine that Walmart's pricing would be lower</b></p> <p>9 <b>than the marketplace?</b></p> <p>10 A. That's just a general understanding</p> <p>11 that I have of walmart, and I believe some of the</p> <p>12 retailer-specific price comparisons will bear</p> <p>13 that out.</p> <p>14 <b>Q. Do you have a specific analysis where</b></p> <p>15 <b>that bears itself out?</b></p> <p>16 A. I would look in my work papers, which</p> <p>17 have been provided to you.</p> <p>18 MR. WING: Let's mark this as</p> <p>19 Exhibit 3.</p> <p>20 (Defendant's Exhibit 3, Spreadsheet</p> <p>21 Document Containing Walmart Sales Data,</p> <p>22 marked for identification as of this date.)</p> <p>23 <b>Q. Do you recognize that document? Take</b></p> <p>24 <b>a second to review it.</b></p> <p>25 A. I know I've seen data like this, but I</p> <p>138</p>	<p>1 <b>WEIR</b></p> <p>2 <b>with respect to these retailers, correct?</b></p> <p>3 A. I received raw data from retailers</p> <p>4 that was passed along to me by counsel. Yes.</p> <p>5 <b>Q. Does this document reflect wholesale</b></p> <p>6 <b>numbers anywhere on it?</b></p> <p>7 A. Without the benefit of the whole</p> <p>8 spreadsheet in front of me, my recollection is</p> <p>9 that this reflects somebody's retail sales or a</p> <p>10 portion of them.</p> <p>11 <b>Q. And so, to your recollection, does</b></p> <p>12 <b>this appear consistent with a document that would</b></p> <p>13 <b>have been generated by you or on your behalf,</b></p> <p>14 <b>sort of collecting raw data that was received?</b></p> <p>15 A. No. This is reflective of a document</p> <p>16 that would have been produced by one of the</p> <p>17 retailers in the case.</p> <p>18 <b>Q. So, you believe that this document in</b></p> <p>19 <b>this format was produced to you directly -- well,</b></p> <p>20 <b>produced directly by one of the retailers in this</b></p> <p>21 <b>case?</b></p> <p>22 A. Again, it's been some time since I've</p> <p>23 looked at this, but, to the best of my</p> <p>24 recollection, this would be the raw retail data,</p> <p>25 not an analysis that was performed by me.</p> <p>140</p>



<p>1 WEIR</p> <p>2 Q. I'm not stating whether it's an</p> <p>3 analysis performed by you. Is this a document</p> <p>4 that would have been generated by you or your</p> <p>5 office?</p> <p>6 A. To my best recollection, and I</p> <p>7 apologize that this is some time ago now, this</p> <p>8 would have been produced to me, not produced by</p> <p>9 me.</p> <p>10 (Defendant's Exhibit No. 4,</p> <p>11 Spreadsheet Document, marked for</p> <p>12 identification as of this date.)</p> <p>13 Q. Do you recognize that document?</p> <p>14 A. Again, to the best of my recollection,</p> <p>15 I've seen data in this format before, but whether</p> <p>16 or not I've seen this precise document, I can't</p> <p>17 recall specifically.</p> <p>18 Q. It looks to be in a similar format to</p> <p>19 the prior document, outside of the specific</p> <p>20 categories of data?</p> <p>21 A. I mean, they're both spreadsheets that</p> <p>22 contain information about Bell &amp; Howell pest</p> <p>23 repellers. We could take issue with whether or</p> <p>24 not they are similar in terms of what they</p> <p>25 contain.</p> <p>141</p>	<p>1 WEIR</p> <p>2 Q. Do you recognize this document?</p> <p>3 A. Again, the type of data is familiar to</p> <p>4 me, but I don't -- I don't have a recollection of</p> <p>5 this specific document.</p> <p>6 Q. Does this document refresh your</p> <p>7 recollection as to whether there were retailers</p> <p>8 for which you were provided unit sales but were</p> <p>9 not provided actual monetary sales figures?</p> <p>10 A. It does not provide that recollection</p> <p>11 one way or the other.</p> <p>12 Q. This document that is in front of you,</p> <p>13 it includes what appears to be columns for units</p> <p>14 sold nationwide and units sold in California,</p> <p>15 correct?</p> <p>16 A. It would appear to be. Yes.</p> <p>17 Q. This document does not include any</p> <p>18 reference to monetary retail sales figures,</p> <p>19 correct?</p> <p>20 A. Not in the format that you've marked</p> <p>21 it as an exhibit.</p> <p>22 Q. Looking at that Exhibit 5, there are a</p> <p>23 number of item descriptions. If we look at the</p> <p>24 second one down, it reflects the B&amp;H Solar Animal</p> <p>25 Repeller, correct?</p> <p>143</p>
<p>1 WEIR</p> <p>2 Q. In your review of this document, do</p> <p>3 you have any recollection as to which retailer</p> <p>4 this data would relate to?</p> <p>5 A. Again, without looking at the totality</p> <p>6 of the file that might identify that, I don't</p> <p>7 have a specific recollection, by looking at this</p> <p>8 printout, from some of the spreadsheet.</p> <p>9 Q. So, this document and the prior</p> <p>10 document includes a description of the item or</p> <p>11 item description, correct?</p> <p>12 A. Well, in Exhibit 4 there is a column</p> <p>13 called "Item Description." In Exhibit 3 there's</p> <p>14 both "Primary Description" and "Signing</p> <p>15 Description."</p> <p>16 Q. And both these documents include a</p> <p>17 figure of number of units sold in both California</p> <p>18 and nationwide, correct?</p> <p>19 A. Correct.</p> <p>20 Q. And dollar sales figures for those</p> <p>21 numbers, correct?</p> <p>22 A. It would appear to be. Yes.</p> <p>23 (Defendant's Exhibit No. 5,</p> <p>24 Spreadsheet Document, marked for</p> <p>25 identification as of this date.)</p> <p>142</p>	<p>1 WEIR</p> <p>2 A. That's what it states there. Yes.</p> <p>3 Q. Are you aware that the Bell &amp; Howell</p> <p>4 Solar Animal Repellers are not a part of this</p> <p>5 litigation, correct?</p> <p>6 A. That's my understanding.</p> <p>7 Q. So, it's your understanding that, to</p> <p>8 the extent that information was provided with</p> <p>9 respect to the Solar Animal Repellers, that</p> <p>10 information would have been omitted from any</p> <p>11 analysis?</p> <p>12 A. Again, that was our best intention. I</p> <p>13 don't believe that any solar animal repeller was</p> <p>14 included in the analysis.</p> <p>15 Q. Did you do anything to confirm that no</p> <p>16 solar animal repeller was included in the</p> <p>17 analysis?</p> <p>18 A. Well, it was the active exclusion of</p> <p>19 them upon which I'm making my statements. That's</p> <p>20 the basis for my statements.</p> <p>21 Q. So, you confirmed that the Bell &amp;</p> <p>22 Howell solar -- so, any sales figures for Bell &amp;</p> <p>23 Howell solar animal repellers were specifically</p> <p>24 excluded from your analysis?</p> <p>25 A. Yes.</p> <p>144</p>



<p>1 WEIR</p> <p>2 Q. Is that reflected anywhere in your</p> <p>3 report?</p> <p>4 A. I believe you can see it in the</p> <p>5 summary of the data that I have here, which is</p> <p>6 that these are relating to the pest repellers,</p> <p>7 not the animal repellers.</p> <p>8 Q. I mean, that's what's stated there.</p> <p>9 I'm speaking, when we're discussing</p> <p>10 the totality of retail sales, did you do anything</p> <p>11 to confirm that any retail sales figures that</p> <p>12 were provided to you by these retailers were not</p> <p>13 then included in the aggregate sales that you</p> <p>14 used to perform your analysis?</p> <p>15 A. Again, we actively excluded those</p> <p>16 records from the analysis of the ultrasonic pest</p> <p>17 repellers.</p> <p>18 Q. And that is reflected in your report,</p> <p>19 simply in the fact that they are not identified?</p> <p>20 Is that your --</p> <p>21 A. They're not identified and they're not</p> <p>22 included in the analysis.</p> <p>23 (Defendant's Exhibit No. 6,</p> <p>24 Spreadsheet Document, marked for</p> <p>25 identification as of this date.</p> <p>145</p>	<p>1 WEIR</p> <p>2 captured by depo Exhibit 6.</p> <p>3 Q. Okay. So, as you stated, the tab for</p> <p>4 that spreadsheet in the document that was</p> <p>5 provided in response to the subpoena reflects</p> <p>6 that that is information from Family Dollar,</p> <p>7 correct?</p> <p>8 A. That's what the tab in the spreadsheet</p> <p>9 says.</p> <p>10 Q. Do you have any reason to believe that</p> <p>11 the tab in the spreadsheet provided in response</p> <p>12 to the subpoena would be incorrect?</p> <p>13 A. NO.</p> <p>14 Q. I mean, does this refresh your</p> <p>15 recollection as to whether you were provided</p> <p>16 monetary sales figures from Family Dollar?</p> <p>17 A. Again, since this isn't the universe</p> <p>18 of the sales data that I had in possession, I</p> <p>19 can't state with certainty one way or the other</p> <p>20 about whether Family Dollar provided retail sales</p> <p>21 dollar figures.</p> <p>22 Q. When you state "the universe of the</p> <p>23 sales data you received," what are you referring</p> <p>24 to?</p> <p>25 A. Well, I cite in the body of my report</p> <p>147</p>
<p>1 WEIR</p> <p>2 Q. Do you recognize that document?</p> <p>3 A. Again, it looks familiar, but I don't</p> <p>4 have a specific recollection of this particular</p> <p>5 document as I sit here today.</p> <p>6 Q. And again, this document includes the</p> <p>7 number of unit sales, but not any monetary</p> <p>8 figure, correct?</p> <p>9 A. That's what it appears to show is unit</p> <p>10 sales.</p> <p>11 Q. Just for ease, I'm going to show</p> <p>12 you -- this is the electronic format in which</p> <p>13 these documents were produced, just so we have --</p> <p>14 so, we have a spreadsheet. This was included in</p> <p>15 the materials that were provided to us by</p> <p>16 counsel.</p> <p>17 A. Okay.</p> <p>18 Q. So, this specific spreadsheet we're</p> <p>19 looking at now is the spreadsheet that would be</p> <p>20 Exhibit 6, correct?</p> <p>21 MR. ARISOHN: Do you want to review</p> <p>22 it?</p> <p>23 THE WITNESS: Again, subject to,</p> <p>24 maybe, a more thorough check, it would</p> <p>25 appear that this Family Dollar tab is</p> <p>146</p>	<p>1 WEIR</p> <p>2 and in Exhibit 2 thereto any number of</p> <p>3 spreadsheets which are not this one.</p> <p>4 So, in order for me to state</p> <p>5 categorically one way or the other, I would need</p> <p>6 to look at all of those documents that I</p> <p>7 received.</p> <p>8 Q. To the extent that you had received</p> <p>9 any of those documents, would you have provided</p> <p>10 them to counsel in response to that subpoena?</p> <p>11 A. Whether I would have provided them or</p> <p>12 whether they were already in possession of them,</p> <p>13 I don't know.</p> <p>14 Q. If you look at the second tab that --</p> <p>15 if you want to look at that, I believe that would</p> <p>16 be Exhibit 4.</p> <p>17 A. That's many pages. Again, subject to</p> <p>18 more detailed review, Exhibit 4 appears to</p> <p>19 correspond to the tab HSN.</p> <p>20 Q. So, it's your understanding that</p> <p>21 would reflect retail data that was received from</p> <p>22 Home Shopping Network?</p> <p>23 A. Or at least part of it. Yes.</p> <p>24 Q. And looking at the spreadsheet, to the</p> <p>25 extent that this was provided in this format from</p> <p>148</p>





<p>1 WEIR</p> <p>2 counsel, would this indicate that this data was</p> <p>3 received and input in spreadsheets by you and/or</p> <p>4 on your behalf?</p> <p>5 A. Again, it could be that this data came</p> <p>6 from a PDF and was input into a spreadsheet, it</p> <p>7 could be that this data was provided as a</p> <p>8 spreadsheet. I just don't recall the specifics</p> <p>9 of how the production took place.</p> <p>10 Q. Do you have any reason to believe that</p> <p>11 this spreadsheet would not reflect the totality</p> <p>12 of the data that was received with respect to</p> <p>13 these individual retailers?</p> <p>14 A. Without looking back at the original</p> <p>15 data, I couldn't answer that question one way or</p> <p>16 the other as I sit here today.</p> <p>17 Q. And I believe you testified earlier</p> <p>18 that you believe this to be the original data</p> <p>19 that was received?</p> <p>20 A. I said that this is not an analysis</p> <p>21 that was performed by us. I believe it is</p> <p>22 reflective of original data that would be</p> <p>23 produced, but, whether it is reflective of the</p> <p>24 totality or not, without going back to the source</p> <p>25 documents, I can't state with certainty, as I sit</p> <p style="text-align: right;">149</p>	<p>1 WEIR</p> <p>2 spreadsheet that you've printed out.</p> <p>3 Q. Do you recall whether you received</p> <p>4 monetary sales figures for Family Dollar or</p> <p>5 Dr. Leonard's?</p> <p>6 A. Again, as I sit here today, I don't</p> <p>7 have a recollection one way or the other.</p> <p>8 Q. To the extent that you did receive</p> <p>9 that information, would it have been your</p> <p>10 expectation that it was provided in response to</p> <p>11 the subpoena that you received in this case?</p> <p>12 A. Yes.</p> <p>13 (Recess taken.)</p> <p>14 BY MR. WING:</p> <p>15 Q. Back on the record. Just to follow up</p> <p>16 briefly on where we were prior to lunch, we were</p> <p>17 discussing the spreadsheets, Exhibits 3, 4, 5 and</p> <p>18 6.</p> <p>19 Looking at those documents, as we</p> <p>20 discussed, they include nationwide sales figures</p> <p>21 and California sales figures, correct? At least</p> <p>22 with respect to units sold?</p> <p>23 A. I believe that's correct. Yes.</p> <p>24 Q. None of these documents reflect any</p> <p>25 state-specific sales information other than</p> <p style="text-align: right;">151</p>
<p>1 WEIR</p> <p>2 here today.</p> <p>3 Q. The next tab, this would be Exhibit, I</p> <p>4 believe, 3.</p> <p>5 A. Again, subject to a more detailed</p> <p>6 check, it appears that depo Exhibit 3 is</p> <p>7 reflective of the Walmart tab in the spreadsheet</p> <p>8 that you have on your computer.</p> <p>9 Q. And this would be Exhibit 5. This</p> <p>10 one's relatively short. Is it fair to say that</p> <p>11 Exhibit 5 reflects the Dr. Leonard's tab?</p> <p>12 A. I don't know whether it's fair, but I</p> <p>13 believe that Exhibit 5 is a printout of the</p> <p>14 Dr. Leonard's tab of this spreadsheet.</p> <p>15 Q. So, looking at the documents, at least</p> <p>16 as reflected in this spreadsheet, monetary sales</p> <p>17 figures are included in the spreadsheets for HSN</p> <p>18 and Walmart, correct?</p> <p>19 A. I think that's what these exhibits</p> <p>20 reflect. Yes.</p> <p>21 Q. And the exhibits in the spreadsheet</p> <p>22 that was provided for Dr. Leonard's and Family</p> <p>23 Dollar do not reflect monetary sales figures,</p> <p>24 correct?</p> <p>25 A. At least in this particular</p> <p style="text-align: right;">150</p>	<p>1 WEIR</p> <p>2 California, correct?</p> <p>3 A. So, it includes the California</p> <p>4 state-specific and it includes the nationwide</p> <p>5 data, which is, of course, the sum of all of the</p> <p>6 states.</p> <p>7 Q. It does not include a breakdown</p> <p>8 specific to the individual states for that sales</p> <p>9 information, correct?</p> <p>10 A. It does not itself include a</p> <p>11 breakdown, but it includes data that permits you</p> <p>12 to breakdown to the individual states.</p> <p>13 Q. In and of itself it includes data that</p> <p>14 allows you to break it down into individual</p> <p>15 states?</p> <p>16 A. It includes some of the data necessary</p> <p>17 to break down into individual states.</p> <p>18 Q. You would need additional information</p> <p>19 to do that calculation?</p> <p>20 A. Well, I don't need additional</p> <p>21 information, because I have the information</p> <p>22 necessary. But, Exhibits 3, 4 and 5 by</p> <p>23 themselves would provide some, but not all, of</p> <p>24 the information you would want to look at.</p> <p>25 Q. So, the information in those documents</p> <p style="text-align: right;">152</p>





<p>1 WEIR</p> <p>2 was information you testified that was provided</p> <p>3 by those retailers, correct?</p> <p>4 A. To the best of my recollection, the</p> <p>5 data contained here is the data that was provided</p> <p>6 by the individual retailers.</p> <p>7 Q. So, the individual retailer provided a</p> <p>8 specific breakdown of sales figures for</p> <p>9 California, correct?</p> <p>10 A. It's my understanding that they did.</p> <p>11 Q. It's your understanding? I mean,</p> <p>12 that's part of your work in this case, correct?</p> <p>13 A. I don't understand.</p> <p>14 Q. One of the things you did in this case</p> <p>15 was break down a California class of damages,</p> <p>16 correct?</p> <p>17 A. Yes, I did.</p> <p>18 Q. And that was based, according to your</p> <p>19 report, on specific information relating to</p> <p>20 California that was provided by the retailers,</p> <p>21 correct?</p> <p>22 A. Yes.</p> <p>23 Q. The four retailers for which we have</p> <p>24 spreadsheets there did not provide you with a</p> <p>25 breakdown of state-specific retail information,</p> <p>153</p>	<p>1 WEIR</p> <p>2 you referring to?</p> <p>3 A. I did the state-by-state breakdown</p> <p>4 using the Harriet Carter data and then compared</p> <p>5 those results with a state-by-state breakdown</p> <p>6 based upon various government indices, such as</p> <p>7 population data and personal consumption</p> <p>8 expenditure data and GDP data to verify the</p> <p>9 reasonableness of the estimate being generated by</p> <p>10 the Harriet Carter data.</p> <p>11 Q. Where did you acquire the data with</p> <p>12 respect to populations and et cetera?</p> <p>13 A. That's data that we use regularly for</p> <p>14 the same purpose in my firm. I believe it</p> <p>15 originally hails from the Bureau of Economic</p> <p>16 Analysis.</p> <p>17 Q. Where in your report is your analysis</p> <p>18 of those population figures and that data? Where</p> <p>19 is that reflected in your report?</p> <p>20 A. Well, again, what I used the BEA data</p> <p>21 for was to sanity check and verify the</p> <p>22 reliability of the Harriet Carter data.</p> <p>23 So, my report relies upon the Harriet</p> <p>24 Carter data, but I have validated the use of that</p> <p>25 data using these government agency data points.</p> <p>155</p>
<p>1 WEIR</p> <p>2 correct?</p> <p>3 A. They provide retail information that</p> <p>4 can be broken down on a state-specific basis,</p> <p>5 along with other information.</p> <p>6 Q. The information they provided, you did</p> <p>7 not break that information down, correct?</p> <p>8 A. Again, they provided information that</p> <p>9 could be broken down, but you would require</p> <p>10 additional data that I have from other sources to</p> <p>11 do that.</p> <p>12 Q. What data is that?</p> <p>13 A. So, we used the sales information that</p> <p>14 was broken down by a retailer on a state-by-state</p> <p>15 basis, which, I believe that retailer was Harriet</p> <p>16 Carter.</p> <p>17 Q. So, you used the information for a</p> <p>18 single retailer to determine what the</p> <p>19 state-by-state breakdown would be?</p> <p>20 A. Yes. I used the information from a</p> <p>21 single retailer, Harriet Carter, after I</p> <p>22 confirmed that the estimates from Harriet Carter</p> <p>23 met various sanity checks, to verify the accuracy</p> <p>24 of that data.</p> <p>25 Q. When you say "sanity checks," what are</p> <p>154</p>	<p>1 WEIR</p> <p>2 Q. So, you testified earlier that any</p> <p>3 documents and information you relied upon was</p> <p>4 reflected in that list of documents or the body</p> <p>5 of the report, correct?</p> <p>6 A. As well as things that I bring from my</p> <p>7 prior experience and educational background.</p> <p>8 Q. Population data is not something you</p> <p>9 bring from your prior experience or educational</p> <p>10 background, correct?</p> <p>11 A. It certainly is something that I bring</p> <p>12 from my prior experience. I've used population</p> <p>13 data specifically to apportion sales by state on</p> <p>14 many occasions using that same data.</p> <p>15 Q. The data itself is nowhere reflected</p> <p>16 in this report, correct?</p> <p>17 A. That's because I didn't rely</p> <p>18 specifically on that data. I used it as a tool</p> <p>19 to validate the Harriet Carter data.</p> <p>20 Q. Did you perform any comparative</p> <p>21 analysis between the population data and</p> <p>22 et cetera on the Harriet Carter data, other than</p> <p>23 in your own head?</p> <p>24 A. It was done in a spreadsheet.</p> <p>25 Q. In a Excel spreadsheet?</p> <p>156</p>



<p>1 WEIR</p> <p>2 A. Yes.</p> <p>3 Q. And was that Excel spreadsheet in your</p> <p>4 disclosures in this case?</p> <p>5 A. I would have to go back and</p> <p>6 double-check, but I believe so.</p> <p>7 Q. And it sets forth the data from the</p> <p>8 economic bureau that you've discussed?</p> <p>9 A. It would be the state-by-state index</p> <p>10 results for -- my recollection was, there were</p> <p>11 three different indices that we used to verify</p> <p>12 the Harriet Carter data.</p> <p>13 Q. And it's your understanding those were</p> <p>14 in Excel spreadsheets and that those were</p> <p>15 provided as part of your report?</p> <p>16 A. Well, the spreadsheets were provided</p> <p>17 as part of the production, they were not put into</p> <p>18 the report.</p> <p>19 But, to the best of my recollection,</p> <p>20 the data is included in a spreadsheet and was</p> <p>21 part of the production.</p> <p>22 Q. The indices that you reference, which</p> <p>23 were these indices?</p> <p>24 A. One related to the Census Bureau's</p> <p>25 population by state in the United States, another</p> <p>157</p>	<p>1 WEIR</p> <p>2 Q. And so, the indices that you discussed</p> <p>3 that you used, where is that information kept?</p> <p>4 A. It's kept in the work papers.</p> <p>5 Q. I mean, where did you get that data</p> <p>6 from?</p> <p>7 A. I mean, at some point in time we would</p> <p>8 have downloaded it from the Bureau of Economic</p> <p>9 Analysis and its subsidiary agencies, like Bureau</p> <p>10 of the Census. But, this is data that we</p> <p>11 regularly use in the course of generating work</p> <p>12 product like this, so, I believe I already</p> <p>13 possessed it.</p> <p>14 Q. So, it's data that you have on hand in</p> <p>15 your office, is your understanding?</p> <p>16 A. Yes. We use this so routinely that</p> <p>17 it's just on our network.</p> <p>18 Q. And again, it's nowhere referenced in</p> <p>19 this report that that information was referred or</p> <p>20 utilized?</p> <p>21 A. Again, it's referenced in the work</p> <p>22 papers that underpin the report.</p> <p>23 Q. And it's your understanding that there</p> <p>24 is a specific document wherein this analysis was</p> <p>25 performed?</p> <p>159</p>
<p>1 WEIR</p> <p>2 related to gross domestic product or similar data</p> <p>3 by state and a third reflected consumer</p> <p>4 expenditures on pest control by state.</p> <p>5 Q. Where in your report that you</p> <p>6 disclosed in this case do you provide the opinion</p> <p>7 that the state-by-state sales figures were</p> <p>8 collaborated by these various indices?</p> <p>9 A. I don't know that I state that</p> <p>10 expressly, but, in my confidence in using the</p> <p>11 Harriet Carter data, to make the allocation,</p> <p>12 which is described -- let's see. I described it</p> <p>13 in paragraph 18, my use of the Harriet Carter</p> <p>14 data.</p> <p>15 Q. You said you use the Harriet Carter</p> <p>16 data. If we look at paragraph 18, is there</p> <p>17 anywhere in that paragraph 18 where it references</p> <p>18 any comparative analysis between state economic</p> <p>19 indices or any other comparative analysis or</p> <p>20 opinion?</p> <p>21 A. I don't think I make reference to the</p> <p>22 background work that I did to beat myself to the</p> <p>23 confidence in the Harriet Carter data that I use</p> <p>24 in paragraph 18. That's reflected in my work</p> <p>25 papers.</p> <p>158</p>	<p>1 WEIR</p> <p>2 A. To the best of my recollection, yes.</p> <p>3 Q. And was this analysis that you,</p> <p>4 yourself, personally performed?</p> <p>5 A. It was probably done under my</p> <p>6 direction by Andrew Kearns.</p> <p>7 Q. And do you recall specifically whether</p> <p>8 or not you performed that analysis?</p> <p>9 A. I recall that the analysis was done.</p> <p>10 whether it was me that compiled the spreadsheet</p> <p>11 or Andrew, I don't recall as I sit here today.</p> <p>12 Q. Do you recall what analysis was</p> <p>13 performed on that? Was it purely comparative</p> <p>14 eyeballing?</p> <p>15 A. The comparison that was done was to</p> <p>16 take the Harriet Carter data index for the</p> <p>17 multistate class and to determine the percent of</p> <p>18 the nation reflected therein and to compute the</p> <p>19 same values with the alternate indices to see</p> <p>20 whether they corroborated that data or suggested</p> <p>21 something else.</p> <p>22 And all of the data points</p> <p>23 suggested -- I forget what the number is off the</p> <p>24 top of my head, but something like 55-odd percent</p> <p>25 of the nationwide data -- yeah, 55 percent, plus</p> <p>160</p>



<p>1 WEIR</p> <p>2 or minus, comes from the proposed multistate</p> <p>3 class.</p> <p>4 Q. So, the number that you were</p> <p>5 referencing, the 55 percent, that comes from the</p> <p>6 table in your report, correct?</p> <p>7 A. That's the result of the Harriet</p> <p>8 Carter data that is affirmed by the other</p> <p>9 indices. Yes.</p> <p>10 Q. But, this data is purely from Harriet</p> <p>11 Carter, correct?</p> <p>12 A. To the best of my recollection, it is.</p> <p>13 RQ MR. WING: And I'm going to say that</p> <p>14 we have received no spreadsheet reflecting</p> <p>15 the use of economic indices, so, I would</p> <p>16 request that, to the extent they exist, they</p> <p>17 be produced immediately. That was not part</p> <p>18 of any document production that has been</p> <p>19 thus far received by us.</p> <p>20 Q. I'm going to show you again this --</p> <p>21 for ease I'm using the spreadsheet on my</p> <p>22 computer. This is a spreadsheet that we did</p> <p>23 receive as part of the document production in</p> <p>24 this case, which we understand to be complete as</p> <p>25 to the underlying documentation.</p> <p>161</p>	<p>1 WEIR</p> <p>2 A. It should be. Yes.</p> <p>3 Q. And this spreadsheet, this summary,</p> <p>4 includes the state, that includes the -- a "State</p> <p>5 U.S. Retail Dollar Sales Percentage" column,</p> <p>6 correct?</p> <p>7 A. Yes.</p> <p>8 Q. And that state retail dollar sales</p> <p>9 percentage is based on your analysis of the</p> <p>10 Harriet Carter data, correct?</p> <p>11 A. It is.</p> <p>12 Q. That is not based on your analysis of</p> <p>13 any other retail sales data, correct?</p> <p>14 A. It's based on the Harriet Carter data</p> <p>15 that was validated for accuracy using the indices</p> <p>16 that we've described before.</p> <p>17 Q. Other than those indices, did you do</p> <p>18 anything else to validate the accuracy of those</p> <p>19 sales figures?</p> <p>20 A. The work that I did to validate the</p> <p>21 accuracy of the use of the Harriet Carter data</p> <p>22 was the comparison to the U.S. government data</p> <p>23 indices. I have done no additional work, because</p> <p>24 that validation corroborated the use of the</p> <p>25 Harriet Carter data.</p> <p>163</p>
<p>1 WEIR</p> <p>2 If we look at the bottom tabs, we have</p> <p>3 a "Percentage Price" tab, a "U.S. Sales" tab, a</p> <p>4 "California U.S. Sales" tab and then a "25-State</p> <p>5 Class" tab, correct?</p> <p>6 A. That's what's on this document that's</p> <p>7 on your screen right now.</p> <p>8 Q. Is this a document that you recognize?</p> <p>9 A. I believe this is the work paper that</p> <p>10 was used to generate Exhibit 3 to my Declaration.</p> <p>11 Q. So, this was used to generate</p> <p>12 Exhibit 3. This document reflects --</p> <p>13 So, we are now looking at the tab that</p> <p>14 is labeled "25-State Class," correct?</p> <p>15 A. Correct.</p> <p>16 Q. And this has the 25 states that are,</p> <p>17 to your understanding, states that are included</p> <p>18 in the multistate class, correct?</p> <p>19 A. The "25-State Class" tab is a summary</p> <p>20 of the individual state tabs that are to the</p> <p>21 right that show the state retail dollar sales</p> <p>22 that comprise the 25-state multistate class.</p> <p>23 Q. So, thereafter we have an individual</p> <p>24 tab for each of these states that are listed in</p> <p>25 this summary spreadsheet, correct?</p> <p>162</p>	<p>1 WEIR</p> <p>2 Q. And then you have a state retail</p> <p>3 dollar sales figure, correct?</p> <p>4 A. That's the third column on this</p> <p>5 particular tab.</p> <p>6 Q. And that column was generated -- you</p> <p>7 multiply the state retail dollar sales percentage</p> <p>8 by the total wholesales for the repellers,</p> <p>9 correct?</p> <p>10 A. No. It's multiplied by the total</p> <p>11 retail dollar sales.</p> <p>12 Q. I believe that's what I meant.</p> <p>13 So, if we look at the next tab, so,</p> <p>14 here we have Alaska sales. We'll look at the</p> <p>15 first tab, "Alaska Sales by SKU," correct? That</p> <p>16 would be the title of the next document?</p> <p>17 A. It's not another document, it's a tab</p> <p>18 in the spreadsheet.</p> <p>19 Q. Next tab in the spreadsheet.</p> <p>20 A. That should be equivalent to page 1 of</p> <p>21 Exhibit 3 to my Declaration.</p> <p>22 Q. Does that appear accurate?</p> <p>23 A. Can you just expand --</p> <p>24 Q. Outside of the --</p> <p>25 A. -- column G there?</p> <p>164</p>



<p>1 WEIR</p> <p>2 Q. And it may be easier for us to then</p> <p>3 look -- we'll look at your report hereafter.</p> <p>4 A. Yeah. Yeah. This -- those tabs</p> <p>5 should each -- this -- this particular document,</p> <p>6 to the extent I understand what it is, and I</p> <p>7 believe you've represented it fairly, is the</p> <p>8 Excel sheet that created each of the individual</p> <p>9 pages for Exhibit 3 to my Declaration.</p> <p>10 Q. To your understanding, the data in</p> <p>11 this spreadsheet, who entered that data into the</p> <p>12 spreadsheet?</p> <p>13 A. Most of this spreadsheet is drawn from</p> <p>14 other locations, so, I don't believe it was a</p> <p>15 matter of data entry.</p> <p>16 Q. Who took the steps to populate this</p> <p>17 spreadsheet?</p> <p>18 A. That work was undertaken by myself and</p> <p>19 Andrew Kearns.</p> <p>20 Q. So, you personally did some work in</p> <p>21 populating these spreadsheets?</p> <p>22 A. Correct.</p> <p>23 Q. And from where was this information</p> <p>24 drawn?</p> <p>25 MR. ARISOHN: Object to form.</p> <p>165</p>	<p>1 WEIR</p> <p>2 various government indices that you discussed</p> <p>3 earlier?</p> <p>4 A. This particular tab includes only the</p> <p>5 Harriet Carter data that was validated elsewhere.</p> <p>6 Q. In this spreadsheet, is there anywhere</p> <p>7 where it reflects the comparative analysis with</p> <p>8 the government indices that you discussed?</p> <p>9 A. I don't know off the top of my head</p> <p>10 whether this spreadsheet contains that comparison</p> <p>11 or not.</p> <p>12 Q. Let's look at the spreadsheet. So,</p> <p>13 the first tab is the "CA, U.S." -- I believe</p> <p>14 that's the California and United States percent</p> <p>15 price tab, correct?</p> <p>16 A. That's what it says. Yes.</p> <p>17 Q. Do you recognize this spreadsheet?</p> <p>18 A. Yes. I believe this is the work paper</p> <p>19 that I generated to make Exhibit 3 to my</p> <p>20 Declaration.</p> <p>21 Q. And this document reflects, to your</p> <p>22 understanding, your comparative analysis of</p> <p>23 California sales to U.S. sales?</p> <p>24 A. It does many things, this document.</p> <p>25 Q. This document does not include a</p> <p>167</p>
<p>1 WEIR</p> <p>2 THE WITNESS: So, the column labeled</p> <p>3 "Item Number," that is the Bell &amp; Howell</p> <p>4 SKU number. The "wholesale Item</p> <p>5 Description" comes from Bell &amp; Howell's own</p> <p>6 wholesale description of each of its</p> <p>7 products.</p> <p>8 The "Total Units Sold Nationwide" I</p> <p>9 believe is the wholesale data that was</p> <p>10 corroborated by the retail data.</p> <p>11 The "Alaska U.S. Retail Sales</p> <p>12 Percentage" is drawn from the Harriet Carter</p> <p>13 data, apportioning, in this case, .19</p> <p>14 percent of sales to Alaska.</p> <p>15 The "Nationwide Retail Price" comes</p> <p>16 from the various different retail pricing</p> <p>17 data that's available and the "Alaska Retail</p> <p>18 Dollar Sales" is a multiplication of the</p> <p>19 units times the allocation percentage and</p> <p>20 the nationwide retail price for each SKU.</p> <p>21 And down at the bottom I believe there</p> <p>22 are some summary statistics to add those</p> <p>23 things up.</p> <p>24 Q. Is there anything in that document</p> <p>25 that reflects the comparative analysis with the</p> <p>166</p>	<p>1 WEIR</p> <p>2 breakdown of state sales, other than California,</p> <p>3 correct?</p> <p>4 A. When you say "the document" --</p> <p>5 Q. This tab of this spreadsheet.</p> <p>6 A. I don't see it as you've got it there</p> <p>7 on the screen.</p> <p>8 Q. The next tab of this spreadsheet is</p> <p>9 titled "U.S. Sales," correct?</p> <p>10 A. It says "U.S. Sales" on the tab.</p> <p>11 Q. And this spreadsheet appears to be</p> <p>12 what was used to populate what would be the</p> <p>13 nationwide sales class in your report; is that</p> <p>14 correct?</p> <p>15 A. I mean, I don't know what the</p> <p>16 nationwide sales class is, but, if you're talking</p> <p>17 about, does it provide data for Table 1, then I</p> <p>18 would say, yes, it provides data for Table 1.</p> <p>19 Q. And Table 1 is labeled "Nationwide</p> <p>20 Sales by SKU"?</p> <p>21 A. "Nationwide Sales by SKU."</p> <p>22 Q. The next document is -- "California</p> <p>23 U.S. Sales" is what the tab is titled, correct?</p> <p>24 A. "CA-U.S. Sales." Yeah.</p> <p>25 Q. Did you do anything to corroborate</p> <p>168</p>





<p>1 WEIR</p> <p>2 that the California sales figures that you</p> <p>3 received passed your sanity test as you did with</p> <p>4 the other states?</p> <p>5 A. I did.</p> <p>6 Q. And that would be included in the</p> <p>7 spreadsheet that you generated that has not been</p> <p>8 produced today?</p> <p>9 A. Correct. Well, I don't know whether</p> <p>10 it's been produced or not. Judging from</p> <p>11 Mr. Boedeker's report, there are plenty of things</p> <p>12 that were produced that seem to have been missed</p> <p>13 by your team.</p> <p>14 Q. Have you been provided a set of all</p> <p>15 the documents that were produced in response to</p> <p>16 that subpoena?</p> <p>17 A. You mean, has my production been given</p> <p>18 back to me?</p> <p>19 Q. I'm saying, do you have personal</p> <p>20 knowledge of what was produced to us, to Defense</p> <p>21 counsel, in response to that subpoena?</p> <p>22 MR. ARISOHN: You should only answer</p> <p>23 that question to the extent that you can do</p> <p>24 so without exposing communications with</p> <p>25 attorneys for Plaintiffs in this case, other</p> <p>169</p>	<p>1 WEIR</p> <p>2 upon the Claims Administration data that has been</p> <p>3 provided to me.</p> <p>4 Q. As of the date of this report, had you</p> <p>5 done anything else to verify that data?</p> <p>6 A. As of the date of this report, the</p> <p>7 verification that I did was based upon the</p> <p>8 government indices. Because of the way in which</p> <p>9 that analysis panned out, I did not feel it</p> <p>10 necessary to conduct additional validation.</p> <p>11 Q. And again, nowhere in this report are</p> <p>12 those governmental indices identified as</p> <p>13 documents or information that you reviewed or</p> <p>14 relied upon, correct?</p> <p>15 A. Again, I don't know that I accept your</p> <p>16 characterization. Because, as I stated earlier,</p> <p>17 they were documents that I routinely rely upon</p> <p>18 and have knowledge of, so, when I speak to my</p> <p>19 experience and understanding of the background</p> <p>20 that I bring to the case, I believe that I do</p> <p>21 implicitly reference them.</p> <p>22 Q. You believe that your knowledge and</p> <p>23 experience implicitly references governmental</p> <p>24 data with respect to population and GDP of</p> <p>25 individual states?</p> <p>171</p>
<p>1 WEIR</p> <p>2 than those specifically called for in</p> <p>3 Rule 26 as they relate to compensation,</p> <p>4 identified facts or data that the party's</p> <p>5 attorney provided to you or that identify</p> <p>6 functions that you relied on.</p> <p>7 MR. WING: And my question is, he has</p> <p>8 made representations as to documents and</p> <p>9 information that have been produced in this</p> <p>10 case and I am asking what the scope of his</p> <p>11 personal knowledge is with respect to what</p> <p>12 has been produced in this case.</p> <p>13 THE WITNESS: So, first of all, if you</p> <p>14 don't mind, I would appreciate it if you</p> <p>15 would take your seat at the table rather</p> <p>16 than stand over my shoulder.</p> <p>17 But, as to your question, I don't have</p> <p>18 a way to verify what Plaintiffs' counsel has</p> <p>19 transmitted to you.</p> <p>20 Q. Thank you.</p> <p>21 And other than that spreadsheet of</p> <p>22 governmental information, did you do anything</p> <p>23 else to verify that the sales percentages for</p> <p>24 each of these states was accurate?</p> <p>25 A. I have re-verified that data based</p> <p>170</p>	<p>1 WEIR</p> <p>2 A. Again, that's not something that I</p> <p>3 researched specifically for this case, that's</p> <p>4 knowledge that I brought to the table in advance</p> <p>5 of this case.</p> <p>6 Q. You reviewed those documents</p> <p>7 specifically to populate those spreadsheets we</p> <p>8 referred to, correct? You or someone on your</p> <p>9 behalf?</p> <p>10 A. I believe the data was just populated.</p> <p>11 I don't believe I reviewed it to populate the</p> <p>12 spreadsheet.</p> <p>13 Q. The data was specifically populated</p> <p>14 into a spreadsheet; you didn't, off the top of</p> <p>15 your head, know that data, correct?</p> <p>16 A. It's true that I did not memorize the</p> <p>17 data, but it is data that I had in mind.</p> <p>18 Q. And again, nowhere in this document do</p> <p>19 you specify what those indices were or identify</p> <p>20 that you refer to them in this document?</p> <p>21 A. The document will speak for itself.</p> <p>22 Q. Please take a look. If you can point</p> <p>23 to me where you refer those pieces of</p> <p>24 information, please let me know.</p> <p>25 A. Again, I would point you to</p> <p>172</p>





<p>1 WEIR</p> <p>2 paragraph 18, where I refer to my use of the</p> <p>3 Harriet Carter data, said confidence in which is</p> <p>4 bolstered by the work that I did. That work is</p> <p>5 contained in the work papers that I have now</p> <p>6 referenced many times on the record.</p> <p>7 Q. You just stated, "said confidence is</p> <p>8 bolstered." Where does that appear in that</p> <p>9 paragraph?</p> <p>10 A. Those words do not appear in that</p> <p>11 paragraph.</p> <p>12 Q. So, that paragraph simply states:</p> <p>13 "I first calculate state-specific</p> <p>14 retail sales shares using Harriet Carter retail</p> <p>15 data."</p> <p>16 Correct?</p> <p>17 A. That's one of the things that that</p> <p>18 paragraph states.</p> <p>19 Q. Anywhere in that paragraph does it</p> <p>20 state that you corroborated or otherwise referred</p> <p>21 to other data in your analysis?</p> <p>22 A. That paragraph does not state that,</p> <p>23 but the work papers support it.</p> <p>24 Q. Anywhere in this report does it state</p> <p>25 that you collaborated or did any other analysis</p> <p>173</p>	<p>1 WEIR</p> <p>2 correct?</p> <p>3 A. I believe that's correct.</p> <p>4 Q. What have you done to verify that you</p> <p>5 produced all of the relevant documents to</p> <p>6 counsel?</p> <p>7 A. I made best efforts to go through my</p> <p>8 file, identify those documents that were</p> <p>9 responsive to the subpoena and that were</p> <p>10 permissible for production, subject to</p> <p>11 Plaintiffs' objections, and then produced them to</p> <p>12 counsel.</p> <p>13 Q. To your understanding, the document</p> <p>14 that you were referring to that includes your</p> <p>15 comparative analysis with the various</p> <p>16 governmental indexes, that was a document that</p> <p>17 you reviewed personally and determined was</p> <p>18 responsive to the subpoena and produced to</p> <p>19 counsel?</p> <p>20 MR. ARISOHN: Object to form. To the</p> <p>21 extent you're asking for a legal conclusion,</p> <p>22 I'll object, as well.</p> <p>23 MR. WING: I'm asking, did he produce</p> <p>24 that to you?</p> <p>25 MR. ARISOHN: You're asking whether a</p> <p>175</p>
<p>1 WEIR</p> <p>2 with respect to the Harriet Carter state-specific</p> <p>3 sale information?</p> <p>4 A. I may not make reference to that</p> <p>5 directly in the report, but, again, it is implied</p> <p>6 in my work papers.</p> <p>7 Q. And which specific work papers is it</p> <p>8 implied in?</p> <p>9 A. Without all of them in front of me, I</p> <p>10 cannot tell you.</p> <p>11 Q. So, you are testifying that it is in</p> <p>12 your work paper; you cannot identify which work</p> <p>13 papers this analysis is included in?</p> <p>14 A. That's a mischaracterization of my</p> <p>15 testimony. What I said is, without having them</p> <p>16 in front of me, I can't tell you what work paper</p> <p>17 it is, but, if I had them in front of me I can</p> <p>18 easily identify it.</p> <p>19 Q. I'm saying, your testimony is that you</p> <p>20 have work papers that reflect this analysis,</p> <p>21 correct?</p> <p>22 A. I have work papers that reflect this</p> <p>23 analysis. Correct.</p> <p>24 Q. And it is your understanding that you</p> <p>25 have provided these work papers to counsel,</p> <p>174</p>	<p>1 WEIR</p> <p>2 document's responsive or not. That sounds</p> <p>3 like a legal question.</p> <p>4 MR. WING: If he determined that it</p> <p>5 was responsive, that is his own personal</p> <p>6 knowledge.</p> <p>7 THE WITNESS: I don't have a</p> <p>8 recollection as to every document of what</p> <p>9 was deemed responsive or permissible for</p> <p>10 disclosure under the subpoena.</p> <p>11 Q. Do you have a personal recollection</p> <p>12 that you produced the document reflecting that</p> <p>13 analysis to counsel?</p> <p>14 A. I produced hundreds, if not thousands</p> <p>15 of pages of documents, and so I don't have a</p> <p>16 precise recollection of whether it was produced</p> <p>17 by me or not.</p> <p>18 Q. Is it your expectation that it would</p> <p>19 have been?</p> <p>20 A. I would have to go back through the</p> <p>21 process of identifying what was responsive to</p> <p>22 this subpoena and what was permissible for</p> <p>23 disclosure, subject to Plaintiffs' objections.</p> <p>24 Q. So, to some extent your analysis was,</p> <p>25 you've testified, completed in the Stata program,</p> <p>176</p>



<p>1 WEIR</p> <p>2 correct?</p> <p>3 A. I did use Stata to complete some of</p> <p>4 the analysis. Yes.</p> <p>5 Q. And to the extent that you used Stata,</p> <p>6 was Stata something that you personally used or</p> <p>7 was that used on your behalf by someone else in</p> <p>8 your office?</p> <p>9 A. Both.</p> <p>10 Q. So, it's my understanding that Stata</p> <p>11 involves coding on certain items, correct?</p> <p>12 A. I don't follow that question.</p> <p>13 Q. What is the process of using Stata?</p> <p>14 If you have a certain question that you want to</p> <p>15 analyze, how would you use Stata to do so?</p> <p>16 A. It's going to depend on what question</p> <p>17 you're trying to analyze.</p> <p>18 Q. Well, just give me the most general</p> <p>19 top line. How would you describe Stata?</p> <p>20 A. It's a program that houses data and</p> <p>21 then can act on that data pursuant to your</p> <p>22 commands.</p> <p>23 Q. So, you, as the user, would input</p> <p>24 commands and the program would then analyze the</p> <p>25 data utilizing those commands?</p> <p style="text-align: right;">177</p>	<p>1 WEIR</p> <p>2 A. I don't know whether it's fair or not.</p> <p>3 Q. Is it true?</p> <p>4 A. I guess I don't agree with the</p> <p>5 characterization. Mr. Kearns was acting under my</p> <p>6 direction to complete various analytical tasks</p> <p>7 using the tools that are available in Stata. And</p> <p>8 in other programs, as well.</p> <p>9 Q. And for some of the tasks that you</p> <p>10 wish to accomplish, do you personally utilize</p> <p>11 Stata to accomplish those tasks?</p> <p>12 A. Yes. I use Stata on a -- mostly daily</p> <p>13 basis.</p> <p>14 Q. And you used it with respect to this</p> <p>15 case?</p> <p>16 A. Yes.</p> <p>17 Q. How did you determine which tasks you</p> <p>18 would personally accomplish and which you would</p> <p>19 have Mr. Kearns accomplish?</p> <p>20 A. I don't know that there was a specific</p> <p>21 set of guidelines for that. Some tasks I would</p> <p>22 give to Mr. Kearns and others things I would do</p> <p>23 myself.</p> <p>24 Q. What did you do to verify that the</p> <p>25 work done by Mr. Kearns was done accurately?</p> <p style="text-align: right;">179</p>
<p>1 WEIR</p> <p>2 A. Correct.</p> <p>3 Q. With respect to the analysis performed</p> <p>4 in this case, the commands that were entered into</p> <p>5 Stata, did you personally enter those commands?</p> <p>6 A. In some cases, yes.</p> <p>7 Q. And to the extent they weren't entered</p> <p>8 by you, they were entered by Andrew; is that</p> <p>9 correct?</p> <p>10 A. Mr. Kearns under my direction.</p> <p>11 Q. And was any work done by Mr. Kearns</p> <p>12 under your specific direction?</p> <p>13 MR. ARISOHN: Object to form.</p> <p>14 THE WITNESS: I don't know what that</p> <p>15 means.</p> <p>16 Q. Would you tell Mr. Kearns exactly what</p> <p>17 to program into the system or was it left up to</p> <p>18 him to decide what exactly was input into the</p> <p>19 system?</p> <p>20 A. The specifics of the analysis were</p> <p>21 specified by me.</p> <p>22 Q. So, you specified the analysis that</p> <p>23 you wanted to be completed and Mr. Kearns</p> <p>24 determined the mechanism by which that would be</p> <p>25 accomplished in Stata; is that fair?</p> <p style="text-align: right;">178</p>	<p>1 WEIR</p> <p>2 A. I would either review his spreadsheet</p> <p>3 work or his Stata analysis and have him work</p> <p>4 through the process by which he was generating</p> <p>5 any data or analysis on my behalf.</p> <p>6 Q. So, when you say you would "review the</p> <p>7 spreadsheets," that would be any Excel</p> <p>8 spreadsheets that were generated based on his</p> <p>9 work in Stata?</p> <p>10 A. Well, if we were working in Excel, I</p> <p>11 would review his Excel spreadsheets. If we were</p> <p>12 working in Stata, I would look at his -- either</p> <p>13 Stata code or output or watch him perform the</p> <p>14 analysis.</p> <p>15 Q. So, there were times when you would be</p> <p>16 physically present and watch him perform the</p> <p>17 analysis?</p> <p>18 A. Yeah. His desk is just down the hall</p> <p>19 from mine, so we very often work together</p> <p>20 collaboratively that way.</p> <p>21 Q. When you say you would review the</p> <p>22 output, that would be output that would be</p> <p>23 generated in Stata?</p> <p>24 A. Correct. So, if you type in a</p> <p>25 command, such as "Compute this regression," the</p> <p style="text-align: right;">180</p>



<p>1 WEIR</p> <p>2 regression results then appear on the screen.</p> <p>3 So, I would look at the results of whatever it</p> <p>4 was that we were doing as they would appear on</p> <p>5 the screen.</p> <p>6 Q. And those results, they are then saved</p> <p>7 by the system in Stata?</p> <p>8 A. Not necessarily.</p> <p>9 Q. Would you be able to later access</p> <p>10 those results?</p> <p>11 A. If not access the results, then</p> <p>12 certainly recreate them.</p> <p>13 Q. But, as far as the actual output for</p> <p>14 what you had accomplished, would those be saved</p> <p>15 as -- actually, maybe a DOT log file? Is that</p> <p>16 something you're familiar with?</p> <p>17 A. I'm familiar with the concept, we</p> <p>18 don't always use it.</p> <p>19 Sometimes, if all I want to do is</p> <p>20 verify something, I'll run an analysis, satisfy</p> <p>21 myself with the results on the screen and move</p> <p>22 along and not save that.</p> <p>23 Q. If there is something that you are</p> <p>24 doing more than just verifying, would it be your</p> <p>25 standard practice to maintain a DOT log file?</p> <p style="text-align: right;">181</p>	<p>1 WEIR</p> <p>2 Federal Rules of Evidence provide for disclosure</p> <p>3 only of final work product, not draft work</p> <p>4 product in any form.</p> <p>5 Q. So, the DOT log files for the analysis</p> <p>6 that you performed in this case, you would</p> <p>7 classify that as a draft?</p> <p>8 A. Would you ask that question again,</p> <p>9 please?</p> <p>10 Q. Yes. So, if you performed analysis of</p> <p>11 data that is set forth in the final report that</p> <p>12 you have produced in this case, your statistical</p> <p>13 analysis of that data you have classified as a</p> <p>14 draft for purposes of disclosure?</p> <p>15 A. If the analysis is set forth in my</p> <p>16 final Declaration, then I would not call it</p> <p>17 draft, I would call it final work product.</p> <p>18 Q. So, your analysis of, for example,</p> <p>19 retail sales versus wholesales, you testified,</p> <p>20 was likely performed in Stata, correct?</p> <p>21 A. I said there was comparison of retail</p> <p>22 or wholesale sales. I did not say that it was</p> <p>23 likely performed in Stata versus Microsoft Excel.</p> <p>24 Q. Do you know whether it was performed</p> <p>25 in Stata or Microsoft Excel?</p> <p style="text-align: right;">183</p>
<p>1 WEIR</p> <p>2 A. Again, not necessarily. If the Stata</p> <p>3 analysis is going to be then used to export a</p> <p>4 table or a spreadsheet, I would let the table or</p> <p>5 spreadsheet stand for itself as a result of that</p> <p>6 analysis. I don't need a log file to say, "Hey,</p> <p>7 I generated a spreadsheet."</p> <p>8 Q. Did you maintain DOT log files for any</p> <p>9 of the work that you did in this case?</p> <p>10 A. I don't have a recollection one way or</p> <p>11 the other.</p> <p>12 Q. As part of the subpoena, if you were</p> <p>13 requested to provide DOT log files for any work</p> <p>14 done on this case, would it be your expectation</p> <p>15 that those were produced?</p> <p>16 A. If DOT log files were produced for</p> <p>17 final and not draft work product, then I would</p> <p>18 expect them to be produced. But, that does not</p> <p>19 necessarily mean that there are any such DOT log</p> <p>20 files responsive to that request.</p> <p>21 Q. So, you would differentiate DOT log</p> <p>22 files created for drafting the report as opposed</p> <p>23 to DOT log files that generated the final data in</p> <p>24 the report?</p> <p>25 A. I've been led to believe that the</p> <p style="text-align: right;">182</p>	<p>1 WEIR</p> <p>2 A. As I sit here today, I don't have a</p> <p>3 precise recollection. I use both of those tools</p> <p>4 regularly.</p> <p>5 Q. To the extent that it was performed in</p> <p>6 Microsoft Excel, do you know if it was produced</p> <p>7 to counsel?</p> <p>8 A. Again, as to any specific document, I</p> <p>9 would have to go back and look. I don't have a</p> <p>10 recollection as I sit here today. I produced</p> <p>11 thousands of pages of documents.</p> <p>12 Q. So, to the extent that you performed</p> <p>13 an analysis of wholesales versus retail sales,</p> <p>14 you do not recall whether that was done in</p> <p>15 Microsoft Excel or Stata?</p> <p>16 A. It might have been a combination of</p> <p>17 the two, I just don't have a specific</p> <p>18 recollection as I sit here today.</p> <p>19 Q. Did you personally perform that</p> <p>20 analysis?</p> <p>21 A. It was likely performed in conjunction</p> <p>22 between myself and Mr. Kearns.</p> <p>23 Q. To your knowledge, to the extent that</p> <p>24 that analysis was performed, did you determine</p> <p>25 that analysis to be a draft for purposes of</p> <p style="text-align: right;">184</p>



<p>1 WEIR</p> <p>2 disclosure?</p> <p>3 A. I don't have any recollection as I sit</p> <p>4 here today.</p> <p>5 Q. Did you, in responding to the subpoena</p> <p>6 that was Exhibit 2 that we looked at earlier, did</p> <p>7 you review the DOT log files, any DOT log files</p> <p>8 that were generated in Stata with respect to this</p> <p>9 case?</p> <p>10 A. I don't have a particular recollection</p> <p>11 of there being any DOT log files. There may be,</p> <p>12 but I don't have a specific recollection of</p> <p>13 looking at any in this case.</p> <p>14 Q. Did you review them in the process of</p> <p>15 responding to that subpoena or did you verify</p> <p>16 they did not exist for purposes of responding to</p> <p>17 the subpoena?</p> <p>18 MR. ARISOHN: Object to form.</p> <p>19 Q. With respect to responding to the</p> <p>20 subpoena that we looked at earlier, did you</p> <p>21 review the Stata program to determine whether or</p> <p>22 not there were DOT log files generated with</p> <p>23 respect to this case?</p> <p>24 A. I would have reviewed to make that</p> <p>25 determination, but I don't have a recollection of</p> <p>185</p>	<p>1 WEIR</p> <p>2 A. At the time, yes.</p> <p>3 Q. And as you sit here today, you are not</p> <p>4 aware of any documents that would be responsive</p> <p>5 to that subpoena that you have not produced?</p> <p>6 A. I don't have an awareness one way or</p> <p>7 the other.</p> <p>8 Q. Other than reviewing the code and/or</p> <p>9 being personally involved, did you do anything</p> <p>10 else with respect to Mr. Kearns' work to verify</p> <p>11 that the Stata program was being used accurately?</p> <p>12 A. Again, I re-ran some of the analyses</p> <p>13 to verify that the numbers were coming out</p> <p>14 correctly. Some of the data was then output back</p> <p>15 to Microsoft Excel that would allow</p> <p>16 cross-checking back and forth.</p> <p>17 Q. When you say it would be output to</p> <p>18 Microsoft Excel, would that be similar to the</p> <p>19 spreadsheets that we were just looking at, the</p> <p>20 state-specific spreadsheets?</p> <p>21 A. I don't know whether that spreadsheet</p> <p>22 was generated in part by Stata, but I do know</p> <p>23 that there is a responsibility that there were</p> <p>24 spreadsheets generated by Stata containing the</p> <p>25 output or tally of the information that had been</p> <p>187</p>
<p>1 WEIR</p> <p>2 whether there were any specific to this case or</p> <p>3 not, as I sit here today.</p> <p>4 Q. To the extent that there were DOT log</p> <p>5 files that were generated with respect to this</p> <p>6 case, did you produce any DOT log files in</p> <p>7 responding to that subpoena?</p> <p>8 A. I don't have a recollection one way or</p> <p>9 the other, as I sit here today.</p> <p>10 Q. Did anyone else in your office assist</p> <p>11 in responding to the subpoena?</p> <p>12 A. I believe Mr. Kearns assisted in</p> <p>13 collecting some of the documents that I</p> <p>14 requested.</p> <p>15 Q. So, Mr. Kearns' work in responding to</p> <p>16 the subpoena was done at your direction?</p> <p>17 A. Correct.</p> <p>18 Q. Did you verify with Mr. Kearns that he</p> <p>19 performed a diligent search of any records that</p> <p>20 would be responsive to the subpoena?</p> <p>21 A. I believe he collected all the</p> <p>22 documents that I had requested.</p> <p>23 Q. So, did you review the documents that</p> <p>24 Mr. Kearns compiled prior to providing them to</p> <p>25 counsel in this case?</p> <p>186</p>	<p>1 WEIR</p> <p>2 input and processed by Stata.</p> <p>3 Q. Did you determine what data would or</p> <p>4 would not be exported to a spreadsheet from</p> <p>5 Stata?</p> <p>6 A. I guess the answer would be yes and</p> <p>7 it's really more of a practical matter than an</p> <p>8 analytical matter.</p> <p>9 So, for purposes of importing</p> <p>10 information into Microsoft word, for example, I</p> <p>11 had the tables made in Excel. Whether or not</p> <p>12 those tables were made from Stata, I don't recall</p> <p>13 precisely as I sit here today, but, that would be</p> <p>14 the type of reason for asking for Excel output</p> <p>15 from Stata.</p> <p>16 Q. So, going back, with respect to the</p> <p>17 items for which you had retail sales pricing,</p> <p>18 that was done as an average of the data that was</p> <p>19 provided to you, correct?</p> <p>20 A. Where we had SKU-specific retail sales</p> <p>21 data, I used the SKU-specific average pricing</p> <p>22 data. Where we did not have SKU-specific data, I</p> <p>23 used market-wide average pricing data.</p> <p>24 Q. And when you say "SKU-specific data,"</p> <p>25 so, there is an item number that Bell &amp; Howell</p> <p>188</p>





<p>1 <b>WEIR</b></p> <p>2 generates that is the SKU for each of these</p> <p>3 specific items, correct?</p> <p>4 A. Shelf-keeping unit, and the SKUs are</p> <p>5 generated by Bell &amp; Howell.</p> <p>6 Q. And that information was provided by</p> <p>7 Bell &amp; Howell, but was not necessarily included</p> <p>8 in the retail sales figures that were provided by</p> <p>9 the retailers, correct?</p> <p>10 A. That's correct.</p> <p>11 Q. Not that it was omitted, but that may</p> <p>12 not have been the manner in which they kept their</p> <p>13 records, correct?</p> <p>14 A. There could be any number of reasons</p> <p>15 why they don't use Bell &amp; Howell's internal SKU.</p> <p>16 Q. Do you recall for which retailers you</p> <p>17 had SKU-specific sales figures?</p> <p>18 A. I don't recall them off the top of my</p> <p>19 head, but, we can infer that based on, for</p> <p>20 example, Table 1, where, if the nationwide retail</p> <p>21 price is \$24.10, we were using the market-wide</p> <p>22 average and, if it is other than \$24.10, we were</p> <p>23 using the SKU-specific information.</p> <p>24 Q. My question is, for which retailers</p> <p>25 did you have SKU-specific information?</p> <p style="text-align: right;">189</p>	<p>1 <b>WEIR</b></p> <p>2 other than Walmart.</p> <p>3 Q. I see. I thought you said that they</p> <p>4 subsequently provided. This was -- you made an</p> <p>5 analysis and you made a determination as to</p> <p>6 match -- you matched up SKUs using some analysis</p> <p>7 and data, correct? This wasn't specific data</p> <p>8 provided by the retailers.</p> <p>9 A. We took data provided by the</p> <p>10 retailers, analyzed it, compared to the wholesale</p> <p>11 data and, in many instances, were able to</p> <p>12 determine what SKU corresponded to the retail</p> <p>13 sales data, and thus we were able to use it as</p> <p>14 SKU-specific information.</p> <p>15 Q. And that analysis that you just</p> <p>16 described, where was that analysis documented?</p> <p>17 A. So, I mentioned it here in</p> <p>18 paragraph 15, where I say in the middle of the</p> <p>19 paragraph: "Retail products were</p> <p>20 matched to specific Bell &amp; Howell SKUs by</p> <p>21 analyzing the distribution of wholesale sales to</p> <p>22 each retailer by SKU and the distribution of</p> <p>23 retail sales by products, as well as by matching</p> <p>24 Defendants' product descriptions and retail</p> <p>25 product descriptions."</p> <p style="text-align: right;">191</p>
<p>1 <b>WEIR</b></p> <p>2 A. Oh. There's basically two categories</p> <p>3 of products. I think we had, literally, the</p> <p>4 SKU-by-SKU match-ups from Walmart.</p> <p>5 But, there were other SKUs that we</p> <p>6 were able to match up based on a comparison of</p> <p>7 the wholesale and retail data.</p> <p>8 So, some of the retailers, other than</p> <p>9 Walmart, provided SKU-by-SKU information after a</p> <p>10 comparison to the wholesale transaction</p> <p>11 information.</p> <p>12 Q. Some of the retailers provided</p> <p>13 SKU-by-SKU information at some point?</p> <p>14 A. Well, again, you keep using these</p> <p>15 words that are a little bit of a</p> <p>16 mischaracterization.</p> <p>17 Walmart literally provided the SKUs</p> <p>18 for the products, other retailers provided -- let</p> <p>19 me call them product-by-product information,</p> <p>20 where I was able to determine the appropriate</p> <p>21 Bell &amp; Howell SKU based upon a comparison of the</p> <p>22 wholesale and retail data in such a way that I</p> <p>23 was able to use the retailer product-by-product</p> <p>24 specific information to generate SKU-by-SKU</p> <p>25 average retail sale price data from retailers</p> <p style="text-align: right;">190</p>	<p>1 <b>WEIR</b></p> <p>2 And then that work was performed in</p> <p>3 various work papers.</p> <p>4 Q. Which work papers would those be?</p> <p>5 A. Again, without having them in front of</p> <p>6 me, I don't know that I could identify them from</p> <p>7 memory, but, if I had the work papers in front of</p> <p>8 me, I could identify for you which work papers</p> <p>9 they are.</p> <p>10 Q. Was that analysis the product-by-</p> <p>11 product analysis, performed in an Excel</p> <p>12 spreadsheet?</p> <p>13 A. I don't recall that specifically as I</p> <p>14 sit here today.</p> <p>15 Q. Did you personally perform that</p> <p>16 analysis?</p> <p>17 A. That work would have been done by</p> <p>18 Mr. Kearns at my direction.</p> <p>19 Q. So, did Mr. Kearns, based on your</p> <p>20 direction, generate a document for you to review</p> <p>21 with respect to that analysis?</p> <p>22 A. I don't recall whether we would have</p> <p>23 looked at a document like an Excel spreadsheet or</p> <p>24 whether we would have been looking at data</p> <p>25 produced on a monitor by Stata.</p> <p style="text-align: right;">192</p>





<p>1 WEIR</p> <p>2 <b>Q. That analysis was ultimately utilized</b></p> <p>3 <b>in some other fashion, correct?</b></p> <p>4 A. I don't know if the analysis was used.</p> <p>5 We used the retail data to generate the average</p> <p>6 price points used in Table 1.</p> <p>7 <b>Q. And was that analysis performed in</b></p> <p>8 <b>Stata?</b></p> <p>9 A. You just asked me that and I said I</p> <p>10 don't recall as I sit here today.</p> <p>11 <b>Q. I'm saying the subsequent analysis.</b></p> <p>12 <b>You said that you then used analysis of the SKUs</b></p> <p>13 <b>and et cetera to perform a price analysis. Was</b></p> <p>14 <b>that analysis performed in Stata, the utilization</b></p> <p>15 <b>of the earlier data that you just testified?</b></p> <p>16 A. I don't recall whether the average</p> <p>17 price points were generated first in Stata or</p> <p>18 Microsoft Excel, but, for example, as you saw in</p> <p>19 Exhibit 3, the final results were used in</p> <p>20 Microsoft Excel to generate the data in these</p> <p>21 tables in my Declaration.</p> <p>22 <b>Q. But, the analysis that went into those</b></p> <p>23 <b>final results, you don't recall whether those</b></p> <p>24 <b>were in Excel or in Stata?</b></p> <p>25 A. Yeah. I use Excel and Stata almost</p> <p style="text-align: right;">193</p>	<p>1 WEIR</p> <p>2 spreadsheet that reflects that analysis.</p> <p>3 To the extent that that has been</p> <p>4 provided or to the extent that it exists and</p> <p>5 has not yet been produced, I would request</p> <p>6 that it be so produced.</p> <p>7 <b>Q. So, after you performed this analysis</b></p> <p>8 <b>of the Bell &amp; Howell SKUs and product</b></p> <p>9 <b>descriptions, how was that utilized to determine</b></p> <p>10 <b>your price figures?</b></p> <p>11 A. Well, that analysis was not, per se,</p> <p>12 used to determine the pricing figures. What was</p> <p>13 done with the pricing figures was to take the</p> <p>14 average -- well, the total dollar sales for any</p> <p>15 particular SKU and divide by the total</p> <p>16 corresponding unit sales for that particular SKU</p> <p>17 to determine the average price point paid during</p> <p>18 the class period for that SKU.</p> <p>19 <b>Q. And that would be the number that's</b></p> <p>20 <b>reflected in Table 1 of your report for certain</b></p> <p>21 <b>of the items?</b></p> <p>22 A. In the "Nationwide Retail Price"</p> <p>23 column for those price points other than those</p> <p>24 marked \$24.10.</p> <p>25 <b>Q. With respect to the other item</b></p> <p style="text-align: right;">195</p>
<p>1 WEIR</p> <p>2 every day of my professional life and so, I don't</p> <p>3 have a recollection often of what software</p> <p>4 program I'm using to perform any one specific</p> <p>5 task unless I'm looking back at that</p> <p>6 documentation.</p> <p>7 <b>Q. So, to the extent that that analysis</b></p> <p>8 <b>was performed in Microsoft Excel, would you have</b></p> <p>9 <b>produced that to counsel in response to this</b></p> <p>10 <b>subpoena?</b></p> <p>11 A. Off the top of my head, I don't know.</p> <p>12 <b>Q. So, again, it's your understanding</b></p> <p>13 <b>that at some point you did perform an analysis of</b></p> <p>14 <b>Bell &amp; Howell SKUs and the product descriptions</b></p> <p>15 <b>set forth in the retail sales figures, correct?</b></p> <p>16 A. Correct.</p> <p>17 <b>Q. And that that analysis is somewhere</b></p> <p>18 <b>either in an Excel spreadsheet or was performed</b></p> <p>19 <b>on Stata, correct?</b></p> <p>20 A. I'm not sure where the analysis would</p> <p>21 be kept, but, that analysis allowed us to</p> <p>22 understand what SKU corresponded with what in the</p> <p>23 retail data.</p> <p>24 MR. WING: Again, I would represent</p> <p>25 that there has been no Microsoft Excel</p> <p style="text-align: right;">194</p>	<p>1 WEIR</p> <p>2 <b>numbers, how was that retail price figured?</b></p> <p>3 A. That was an aggregation of all of the</p> <p>4 dollar sales that we had data for at retail</p> <p>5 divided by all of the corresponding unit sales</p> <p>6 for all products.</p> <p>7 So, it reflects a market-wide average</p> <p>8 price point for Bell &amp; Howell pest repellents for</p> <p>9 the data that we had available to us.</p> <p>10 <b>Q. And that average price that you</b></p> <p>11 <b>calculated, you have used that regardless of the</b></p> <p>12 <b>particular device for which you are calculating</b></p> <p>13 <b>retail sells, correct?</b></p> <p>14 A. I don't know if that's a good</p> <p>15 characterization. What I've done is to use it</p> <p>16 for devices that we don't have SKU-specific</p> <p>17 pricing information for, but I've done it in such</p> <p>18 a way that it is reflective of all of those</p> <p>19 myriad devices in the aggregate for sales to the</p> <p>20 class during the class period.</p> <p>21 <b>Q. You're using that specific price for</b></p> <p>22 <b>each specific item, correct?</b></p> <p>23 A. In the table it's lined up per item,</p> <p>24 but the goal of the analysis is to determine the</p> <p>25 average total retail sales to the class in the</p> <p style="text-align: right;">196</p>



<p>1 WEIR</p> <p>2 aggregate.</p> <p>3 So, I'm looking at across the entirety</p> <p>4 of the product category that is the subject of</p> <p>5 the litigation.</p> <p>6 Q. But, the -- the sales figures for the</p> <p>7 items on the wholesale basis you've used, those</p> <p>8 vary greatly amongst the various items, correct?</p> <p>9 MR. ARISOHN: Object to form.</p> <p>10 THE WITNESS: I don't follow that</p> <p>11 question.</p> <p>12 Q. So, I mean, certain of the item</p> <p>13 numbers have significantly different sales</p> <p>14 figures than other items, correct?</p> <p>15 A. What are you talking about when you</p> <p>16 say "sales figures"?</p> <p>17 Q. So, the numbers that you're using for</p> <p>18 total units sold nationwide, there are items that</p> <p>19 have sold less than a thousand units and there</p> <p>20 are items that have sold hundreds of thousands of</p> <p>21 units, correct?</p> <p>22 A. Correct.</p> <p>23 Q. So, the impact of the pricing figure</p> <p>24 for units that sell a large number of items would</p> <p>25 impact the damage calculation much greater than</p> <p style="text-align: right;">197</p>	<p>1 WEIR</p> <p>2 to which items numbers were sold by which</p> <p>3 retailer?</p> <p>4 A. I don't know that we analyzed it</p> <p>5 per se, but, that information is understandable</p> <p>6 for many of the items.</p> <p>7 Q. Some retailers sell some item numbers</p> <p>8 and not other item numbers, correct? Not all</p> <p>9 retailers sell all of the specific items listed</p> <p>10 in this table, correct?</p> <p>11 A. I believe that's correct.</p> <p>12 Q. Did you do anything to determine the</p> <p>13 differences in pricing between items that were</p> <p>14 sold by one retailer as opposed to another?</p> <p>15 A. We talked about this earlier today</p> <p>16 when you asked a similar question and I told you</p> <p>17 that I endeavored to understand the pricing</p> <p>18 between different retailers and understand the</p> <p>19 retailers that I had pricing information for to</p> <p>20 know whether the average pricing data that I had</p> <p>21 would be conservative.</p> <p>22 And I did conduct such an analysis and</p> <p>23 made a determination that has since been</p> <p>24 validated, that my pricing information here and</p> <p>25 measurement of total sales to the class is indeed</p> <p style="text-align: right;">199</p>
<p>1 WEIR</p> <p>2 units that sell a much smaller number, correct?</p> <p>3 A. Again, I'm not sure how you're using</p> <p>4 those terms. Obviously those products that sell</p> <p>5 more units will have higher damages associated</p> <p>6 with them than those products that have fewer</p> <p>7 units at issue.</p> <p>8 Q. If a product that has a high number of</p> <p>9 sales, if that is multiplied by a higher average</p> <p>10 sales price, that will inflate the damage figure</p> <p>11 more than if a higher sales price is used for a</p> <p>12 low sales figure item, correct, in the aggregate?</p> <p>13 A. No. In the aggregate, absolutely not.</p> <p>14 In the aggregate we're looking at average prices</p> <p>15 across many products and average units across</p> <p>16 many products, and so, those all come out in the</p> <p>17 aggregate to be reflective of the actual prices</p> <p>18 and total dollars spent by consumers during the</p> <p>19 class period.</p> <p>20 There's no artificial inflation of the</p> <p>21 nationwide or state subclass sales in the</p> <p>22 aggregate to the class based upon the use of the</p> <p>23 averages, regardless of the unit sales of any</p> <p>24 particular item.</p> <p>25 Q. Did you do any analysis with respect</p> <p style="text-align: right;">198</p>	<p>1 WEIR</p> <p>2 accurate, if not conservative.</p> <p>3 Q. And that analysis is reflected in your</p> <p>4 work papers; is that your understanding?</p> <p>5 A. Well, the subsequent validation is</p> <p>6 still ongoing, but I know that that is one of the</p> <p>7 conclusions that I have drawn from the additional</p> <p>8 presentation of the Claims Administration data.</p> <p>9 Q. As of the date of this report, was</p> <p>10 that analysis of the comparative pricing between</p> <p>11 retailers documented in your file?</p> <p>12 A. I think it's just self-evident in the</p> <p>13 retail data itself and is maybe not self-evident</p> <p>14 but became evident in my review of the retailers</p> <p>15 and understanding of the pricing of those</p> <p>16 retailers.</p> <p>17 Q. What is the basis for your</p> <p>18 understanding of the pricing of the retailer?</p> <p>19 A. I mean, I've made a career of studying</p> <p>20 how businesses operate and I know, based upon my</p> <p>21 review of Walmart data time and time again,</p> <p>22 reading books about Walmart, that they are going</p> <p>23 to do everything possible to sell products for</p> <p>24 the lowest possible price.</p> <p>25 So, I know that using Walmart sales</p> <p style="text-align: right;">200</p>



<p>1 WEIR</p> <p>2 data as part of a sales average is going to</p> <p>3 result, typically, in either an accurate estimate</p> <p>4 of average price points or a conservative</p> <p>5 estimate of average price points.</p> <p>6 Q. Outside of your own experience, did</p> <p>7 you do anything to verify that the Walmart</p> <p>8 pricing data was representative of the pricing</p> <p>9 data for each of the retailers?</p> <p>10 A. Again, we did side-by-side</p> <p>11 comparisons, which I think can be done with just</p> <p>12 visual inspection of the retailer data, to</p> <p>13 understand that Walmart was on the lower end.</p> <p>14 So, to the extent it's not representative, it's</p> <p>15 conservative in the data.</p> <p>16 Q. Would that analysis be documented in</p> <p>17 your file?</p> <p>18 A. I don't know that it's an express</p> <p>19 analysis as per se and just an examination of the</p> <p>20 retail data, along with an understanding of who</p> <p>21 the retailers are.</p> <p>22 Q. Did you generate a spreadsheet of your</p> <p>23 side-by-side comparison of the pricing of the</p> <p>24 various retailers?</p> <p>25 A. I don't recall doing so.</p> <p style="text-align: right;">201</p>	<p>1 WEIR</p> <p>2 have used it?</p> <p>3 A. A number of Excel spreadsheets and</p> <p>4 Stata files.</p> <p>5 Q. Would there be anything other than</p> <p>6 Excel spreadsheets and data files that you are</p> <p>7 referring to as your work papers?</p> <p>8 A. Just to be clear, what I had said was</p> <p>9 "Stata files."</p> <p>10 Q. Sorry. That's what -- Stata files.</p> <p>11 A. There were -- I don't know that I</p> <p>12 would call them my work papers, but, some of the</p> <p>13 raw data, I believe, had come in PDF form, so,</p> <p>14 there are probably some PDF documents that were</p> <p>15 produced natively by retailers.</p> <p>16 Q. I mean, again, in answering my</p> <p>17 questions you have referred time and time again</p> <p>18 to, "That analysis is in my work papers,"</p> <p>19 et cetera, correct?</p> <p>20 A. I have talked about my work papers.</p> <p>21 Q. And your work papers would refer to</p> <p>22 these Excel spreadsheets that you just mentioned,</p> <p>23 correct?</p> <p>24 A. And the Stata files.</p> <p>25 Q. And again, is it your understanding</p> <p style="text-align: right;">203</p>
<p>1 WEIR</p> <p>2 Q. Did you direct Mr. Kearns to produce a</p> <p>3 spreadsheet of your side-by-side analysis of the</p> <p>4 retail pricing?</p> <p>5 A. I don't recall doing so.</p> <p>6 Q. Did you perform an analysis in Stata</p> <p>7 of your side-by-side comparison of the retail</p> <p>8 pricing?</p> <p>9 A. I don't have a recollection of that.</p> <p>10 Q. Did you direct Mr. Kearns to perform</p> <p>11 such analysis?</p> <p>12 A. I don't have a recollection of that,</p> <p>13 as we sit here today.</p> <p>14 MR. ARISOHN: We've been going for</p> <p>15 about an hour, do you want to take a quick</p> <p>16 break?</p> <p>17 MR. WING: Sure.</p> <p>18 (Recess taken.)</p> <p>19 BY MR. WING:</p> <p>20 Q. Mr. Weir, in questioning today you've</p> <p>21 referred a number of times to your work papers,</p> <p>22 correct?</p> <p>23 A. Correct.</p> <p>24 Q. When you refer to your work papers,</p> <p>25 what would be encompassed within that term as you</p> <p style="text-align: right;">202</p>	<p>1 WEIR</p> <p>2 all of these Excel spreadsheets have been</p> <p>3 produced to counsel?</p> <p>4 A. I just went back and double-checked my</p> <p>5 records as it related to a couple of the lines of</p> <p>6 inquiry that you have asked about.</p> <p>7 The one document that we have</p> <p>8 discovered that was not produced because, at the</p> <p>9 time, it was felt to be draft work product, is</p> <p>10 this comparison of the Harriet Carter data with</p> <p>11 the government indices data.</p> <p>12 I've just produced that to Counsel, I</p> <p>13 understand during the break he just produced to</p> <p>14 you. It is a single-page document with five or</p> <p>15 six columns of data that compare percentage</p> <p>16 factors across the 25 multistate class.</p> <p>17 As to some other categories of data,</p> <p>18 there are a number of things that we've looked at</p> <p>19 that are either raw data or are part of other</p> <p>20 work papers, but did not result in an analysis in</p> <p>21 and of themselves.</p> <p>22 So, as an example, we were just</p> <p>23 talking before the break about the identification</p> <p>24 of SKU-specific information on a retailer-by-</p> <p>25 retailer basis.</p> <p style="text-align: right;">204</p>



<p>1 WEIR</p> <p>2 There is no intermediary analysis that</p> <p>3 I can turn over to you that identifies or</p> <p>4 demonstrates that process. But, the</p> <p>5 identification that has been made of the</p> <p>6 SKU-by-SKU data is self-evident within the Stata</p> <p>7 files that have been produced to you.</p> <p>8 <b>Q. So, they would be an output within the</b></p> <p>9 <b>Stata file that reflects this analysis of the</b></p> <p>10 <b>SKU-by-SKU comparison that you've just</b></p> <p>11 <b>referenced?</b></p> <p>12 A. I don't know whether I'd describe it</p> <p>13 as an output, but, one of the things that we</p> <p>14 provided to you are Stata do-files, which are</p> <p>15 lines of code that cause Stata to execute various</p> <p>16 things. And those do-files themselves contain</p> <p>17 information.</p> <p>18 So, either within the do-file or</p> <p>19 within the underlying data that the do-file acts</p> <p>20 upon, there should be information sufficient to</p> <p>21 determine the SKU-by-SKU determinations that have</p> <p>22 been made as to the individual specific</p> <p>23 retailers.</p> <p>24 But there is no intermediate work</p> <p>25 paper that has not been produced to you that</p> <p style="text-align: right;">205</p>	<p>1 WEIR</p> <p>2 <b>by which that analysis would be completed?</b></p> <p>3 A. I determined the method, it was likely</p> <p>4 executed by both myself and Mr. Kearns.</p> <p>5 <b>Q. And what was the process by which that</b></p> <p>6 <b>data was analyzed?</b></p> <p>7 A. Again, I compared the retail sales</p> <p>8 data with the wholesale sales data on a</p> <p>9 SKU-by-SKU basis and also looked at product</p> <p>10 descriptions, both at the wholesale and retail</p> <p>11 level, and made determinations where I was</p> <p>12 comfortable that certain products would or would</p> <p>13 not be classified as a specific SKU or an</p> <p>14 indeterminate SKU.</p> <p>15 And that -- the results of that effort</p> <p>16 are self-evident in the Stata files that I have</p> <p>17 been led to believe that have been produced to</p> <p>18 you.</p> <p>19 <b>Q. So, you reviewed the sales figures and</b></p> <p>20 <b>made an independent determination yourself which</b></p> <p>21 <b>product descriptions would correspond to which</b></p> <p>22 <b>SKUs?</b></p> <p>23 MR. ARISOHN: Objection to the extent</p> <p>24 it mischaracterizes the witness's prior</p> <p>25 testimony.</p> <p style="text-align: right;">207</p>
<p>1 WEIR</p> <p>2 would guide you through that process.</p> <p>3 <b>Q. You testified earlier that you are not</b></p> <p>4 <b>aware of what had or had not been produced to me,</b></p> <p>5 <b>correct?</b></p> <p>6 A. That's correct. I don't know</p> <p>7 precisely what's been produced to you.</p> <p>8 <b>Q. So, when you testified that that</b></p> <p>9 <b>document or work product, as you understand it,</b></p> <p>10 <b>that document does not exist?</b></p> <p>11 A. I don't follow.</p> <p>12 MR. ARISOHN: Object to form.</p> <p>13 <b>Q. You stated that it had not been</b></p> <p>14 <b>produced to me.</b></p> <p>15 MR. ARISOHN: Object to form. It --</p> <p>16 <b>Q. Sorry. You said that there had been</b></p> <p>17 <b>no intermediary work product that had not been</b></p> <p>18 <b>produced to me, I believe, was what you stated.</b></p> <p>19 A. Right. I'm saying no such document</p> <p>20 exists at all in any shape or form, other than</p> <p>21 the Stata file and the raw data that would serve</p> <p>22 to represent the work that was done to identify</p> <p>23 SKU-by-SKU retailer-specific data.</p> <p>24 <b>Q. And the analysis that was done in</b></p> <p>25 <b>Stata in that regard, who determined the method</b></p> <p style="text-align: right;">206</p>	<p>1 WEIR</p> <p>2 THE WITNESS: I was about to say --</p> <p>3 <b>Q. Is that true?</b></p> <p>4 A. It's an oversimplification, is what it</p> <p>5 is.</p> <p>6 What I said before is that I</p> <p>7 identified the methods by which this could be</p> <p>8 done and the work was done both by Mr. Kearns and</p> <p>9 myself, and that work involved a comparison of</p> <p>10 wholesale and retail SKU-by-SKU data, as well as</p> <p>11 SKU and product-specific product descriptions to</p> <p>12 make a determination of when and where I felt</p> <p>13 comfortable matching retail and wholesale SKU</p> <p>14 data, the results of which are evident within the</p> <p>15 Stata files, which I have been led to believe</p> <p>16 have been produced to you.</p> <p>17 <b>Q. So, the input into the Stata system,</b></p> <p>18 <b>with respect to your comparative analysis of</b></p> <p>19 <b>wholesale data and SKUs, the data to be input,</b></p> <p>20 <b>was that determined by you?</b></p> <p>21 A. Again, I think you're not</p> <p>22 understanding, because, the question is</p> <p>23 suggesting something that doesn't make any sense</p> <p>24 to me.</p> <p>25 <b>Q. At some point data would be input into</b></p> <p style="text-align: right;">208</p>





<p>1 <b>WEIR</b></p> <p>2 the system to make those comparative analysis,</p> <p>3 correct?</p> <p>4 A. No.</p> <p>5 MR. ARISOHN: Object to form.</p> <p>6 <b>Q. Does Stata allow you to make some kind</b></p> <p>7 <b>of determination as to product description?</b></p> <p>8 A. No. What I'm saying is, I've looked</p> <p>9 with my own eyes at the product descriptions made</p> <p>10 by retailers and the product descriptions made by</p> <p>11 Bell &amp; Howell, and where that and other</p> <p>12 information would lead to the match of a SKU</p> <p>13 between Bell &amp; Howell SKUs and the retailer data,</p> <p>14 I would flag that retailer data with that SKU.</p> <p>15 That flagging is self-evident within</p> <p>16 Stata, but the determination was not made by</p> <p>17 Stata. It was made by me.</p> <p>18 <b>Q. That was my initial question. So, the</b></p> <p>19 <b>determination of which -- or the items that would</b></p> <p>20 <b>be matched up for purposes of this analysis, that</b></p> <p>21 <b>was a determination that was made by you?</b></p> <p>22 A. Correct. I feel like we've being</p> <p>23 going in circles on that.</p> <p>24 <b>Q. And so, what analysis would Stata have</b></p> <p>25 <b>done with respect to that information that you</b></p> <p style="text-align: right;">209</p>	<p>1 <b>WEIR</b></p> <p>2 And all I'm asking is, your analysis</p> <p>3 that you personally performed or directed and</p> <p>4 that you just stated was performed in Stata, with</p> <p>5 respect to the comparative analysis between the</p> <p>6 product descriptions and the SKUs, what did that</p> <p>7 analysis consist of?</p> <p>8 A. That statement completely</p> <p>9 mischaracterizes my prior testimony. I just said</p> <p>10 five times in a row that the comparison was not</p> <p>11 made in Stata.</p> <p>12 The Stata files identify the results</p> <p>13 of the comparison that were made by looking at</p> <p>14 the raw data by me and Mr. Kearns under my</p> <p>15 direction.</p> <p>16 <b>Q. So, you compared the product</b></p> <p>17 <b>descriptions for items for which you had no SKU</b></p> <p>18 <b>and items for which you did have a SKU, correct?</b></p> <p>19 A. I compared the wholesale data and the</p> <p>20 wholesale product descriptions to the retail data</p> <p>21 and the retail product descriptions, and when it</p> <p>22 was possible to identify a retail product that</p> <p>23 was not previously matched to a Bell &amp; Howell</p> <p>24 SKU, I assigned it a Bell &amp; Howell SKU when the</p> <p>25 data permitted that identification.</p> <p style="text-align: right;">211</p>
<p>1 <b>WEIR</b></p> <p>2 input?</p> <p>3 A. That I would need to go back and look</p> <p>4 at the Stata do-files to remember everything.</p> <p>5 But, for example, that might have</p> <p>6 generated an average sales price based upon the</p> <p>7 SKU and total sales information.</p> <p>8 <b>Q. You testified that you were involved</b></p> <p>9 <b>in developing in performance analysis, correct?</b></p> <p>10 A. I have oversaw and participated in all</p> <p>11 of the work done in this case.</p> <p>12 What I've told you repeatedly is that</p> <p>13 I use many tools to perform the tasks that I do,</p> <p>14 including Excel, including a pocket calculator,</p> <p>15 including Stata and many other things. So,</p> <p>16 whether something was done in Stata or in Excel,</p> <p>17 I don't have a precise memory of that.</p> <p>18 I just looked up to identify that the</p> <p>19 flags that you're looking for are in the Stata</p> <p>20 files, but, everything else that's in there, I</p> <p>21 would need to go back and refresh my recollection</p> <p>22 as to that.</p> <p>23 <b>Q. You are testifying here today as an</b></p> <p>24 <b>expert with respect to analysis that you did in</b></p> <p>25 <b>these numbers in various Excel or Stata programs.</b></p> <p style="text-align: right;">210</p>	<p>1 <b>WEIR</b></p> <p>2 The identification of those SKUs is</p> <p>3 self-evident in other work that has been done in</p> <p>4 the Stata files, but that analysis was performed</p> <p>5 without using Stata.</p> <p>6 <b>Q. And so, the output from Stata, based</b></p> <p>7 <b>on that input, what was the output from Stata</b></p> <p>8 <b>based on the input you just described?</b></p> <p>9 MR. ARISOHN: Object to form.</p> <p>10 THE WITNESS: What I'm suggesting is,</p> <p>11 I can tell you about the output of my</p> <p>12 analysis. What came from Stata and what</p> <p>13 came from Excel, I'm not prepared to</p> <p>14 identify exactly as we sit here today.</p> <p>15 So, I can tell you that, the analysis</p> <p>16 that we've talked about, the flagging of SKU</p> <p>17 numbers resulted in average prices per SKU</p> <p>18 that could be seen, for example, in Table 1</p> <p>19 in my Declaration.</p> <p>20 Whether that was done in part in</p> <p>21 Stata, in part in Excel, I don't have a</p> <p>22 recollection as I sit here today.</p> <p>23 But, it doesn't really matter what</p> <p>24 tool I use, per se, the results of that</p> <p>25 analysis are found in the "Nationwide Retail</p> <p style="text-align: right;">212</p>



<p>1 WEIR</p> <p>2 Price" column.</p> <p>3 Q. To the extent that that analysis was</p> <p>4 performed in Excel, would those Excel files be</p> <p>5 part of your work papers that you have described</p> <p>6 thus far?</p> <p>7 A. Yes. And we can see that in one of</p> <p>8 the work papers that you already raised. I think</p> <p>9 this was a work paper that had these various</p> <p>10 tables and the computations of these average</p> <p>11 prices included in them.</p> <p>12 Q. And the data in that Excel file, to</p> <p>13 your understanding, to the extent that it</p> <p>14 identifies wholesale figures by SKU, my</p> <p>15 understanding is that those figures are both</p> <p>16 sales information for items for which a SKU was</p> <p>17 provided by the retailers and wholesale figures</p> <p>18 for items that you matched up with SKUs by your</p> <p>19 own comparison?</p> <p>20 MR. ARISOHN: Object to form.</p> <p>21 THE WITNESS: Again, I think that</p> <p>22 misstates what the work papers contain.</p> <p>23 It's my understanding that the</p> <p>24 wholesale data for every product contains a</p> <p>25 Bell &amp; Howell SKU, and that's reflected in</p> <p>213</p>	<p>1 WEIR</p> <p>2 question. What I do know is that I just took a</p> <p>3 moment at the break to identify this document</p> <p>4 which we've been talking about and to reproduce</p> <p>5 it so that it's available for discussion today.</p> <p>6 Q. And so, you reproduced it. Do you</p> <p>7 understand that you did produce it before?</p> <p>8 A. I don't know whether I reproduced it.</p> <p>9 I just said that.</p> <p>10 Q. This document, where did you generate</p> <p>11 this document?</p> <p>12 MR. ARISOHN: Object to form.</p> <p>13 Q. That's sitting in front of me. I</p> <p>14 mean, this document came from somewhere, where</p> <p>15 did it come from?</p> <p>16 A. Where did it come from? I mean, are</p> <p>17 you asking what program? Are you asking where,</p> <p>18 like, physically did I work on this?</p> <p>19 Q. I'm asking that, you retrieved this</p> <p>20 document from somewhere during the break that we</p> <p>21 just took. From where did you retrieve this</p> <p>22 document?</p> <p>23 A. From my company's network.</p> <p>24 Q. So, this is a document that is stored</p> <p>25 electronically on your company's network?</p> <p>215</p>
<p>1 WEIR</p> <p>2 my Table 1, where I have a SKU number for</p> <p>3 every item in the table.</p> <p>4 The retail data, some of those</p> <p>5 products contain Bell &amp; Howell matching SKUs</p> <p>6 and others now contain Bell &amp; Howell SKUs</p> <p>7 that I have independently matched.</p> <p>8 So, my work papers, whether in Stata</p> <p>9 or Excel, will reflect, for some items, the</p> <p>10 flag where I have matched a Bell &amp; Howell</p> <p>11 SKU to the retail data.</p> <p>12 MR. WING: So, we'll mark this as an</p> <p>13 exhibit.</p> <p>14 (Exhibit No. 7, Spreadsheet Document,</p> <p>15 marked for identification as of this date.)</p> <p>16 Q. So, this is a document that was just</p> <p>17 produced to me by Counsel during the break that</p> <p>18 we were just sitting in.</p> <p>19 To your understanding, was this</p> <p>20 document previously produced to counsel?</p> <p>21 A. I don't know the answer to that</p> <p>22 question.</p> <p>23 Q. Did you previously produce this</p> <p>24 document to counsel?</p> <p>25 A. I don't know the answer to that</p> <p>214</p>	<p>1 WEIR</p> <p>2 A. Correct. It's an Excel spreadsheet.</p> <p>3 Q. And where in your company's network</p> <p>4 was this document stored?</p> <p>5 A. I don't understand that question.</p> <p>6 Q. Did you maintain a separate electronic</p> <p>7 file for Excel documents or other documents</p> <p>8 relating to this case?</p> <p>9 A. I still don't understand that</p> <p>10 question. Are you asking did I segregate Excel</p> <p>11 documents or are you asking whether I keep</p> <p>12 documents for this case segregated from other</p> <p>13 cases?</p> <p>14 Q. That is what I am asking. I'm asking</p> <p>15 you, do you have a folder that is "Bell &amp; Howell</p> <p>16 Case" from which you can pull these documents?</p> <p>17 How did you identify which documents</p> <p>18 are relating to the Bell &amp; Howell case in your</p> <p>19 system?</p> <p>20 A. I have a directory dedicated to the</p> <p>21 Bell &amp; Howell matter.</p> <p>22 Q. So, this is a document that was stored</p> <p>23 in the Bell &amp; Howell directory on your system,</p> <p>24 correct?</p> <p>25 A. Correct.</p> <p>216</p>



<p>1 WEIR</p> <p>2 Q. Have you produced all of the documents</p> <p>3 that are within your Bell &amp; Howell directory to</p> <p>4 counsel in this case?</p> <p>5 A. No.</p> <p>6 Q. Which documents from your directory</p> <p>7 have you not produced to counsel in this case?</p> <p>8 A. I have not reproduced any documents</p> <p>9 that were produced during the normal course of</p> <p>10 the litigation to me and I have not produced</p> <p>11 documents that were jointly deemed to be draft</p> <p>12 work product by myself and counsel in this case.</p> <p>13 Q. Did you do anything to confirm with</p> <p>14 counsel which documents were generally disclosed</p> <p>15 during discovery?</p> <p>16 When you say there are two categories</p> <p>17 of documents, right, one that were deemed to be</p> <p>18 non-discoverable pursuant to</p> <p>19 Rule 26 and then a subset of documents that you</p> <p>20 said you weren't going to reproduce, correct?</p> <p>21 A. I don't know if those are the only</p> <p>22 categories, but, there are documents that should</p> <p>23 have already been in Defendants' possession and I</p> <p>24 did not reproduce those, and there are some</p> <p>25 documents that were deemed to not be subject to</p> <p>217</p>	<p>1 WEIR</p> <p>2 A. Well, I would have the ability to look</p> <p>3 back at what I produced to counsel and identify</p> <p>4 those documents that way. Yes.</p> <p>5 Q. To date do you have a written document</p> <p>6 which identifies which documents have been</p> <p>7 produced and which documents have not been</p> <p>8 produced?</p> <p>9 A. No.</p> <p>10 Q. Has counsel requested that you produce</p> <p>11 such a document?</p> <p>12 A. No.</p> <p>13 Q. Looking at, I believe, Exhibit 7, that</p> <p>14 I just showed you, as I am just looking at it,</p> <p>15 can you identify this document for me?</p> <p>16 A. This is a comparison of the Harriet</p> <p>17 Carter 25-state allocation to three government</p> <p>18 indices as we have described before, looking at</p> <p>19 share population, share of pest control service</p> <p>20 sales and shares of retail trade sales.</p> <p>21 And of interest to me was the bottom</p> <p>22 line comparing the Harriet Carter 55 percent</p> <p>23 allocation to the 25 states to 59 percent by</p> <p>24 population, 52 percent by pest control and</p> <p>25 59 percent by retail trade, indicating a</p> <p>219</p>
<p>1 WEIR</p> <p>2 Rule 26 disclosure.</p> <p>3 I believe there are other documents</p> <p>4 that Plaintiff just objected to the production</p> <p>5 generally.</p> <p>6 Q. With respect to documents that you</p> <p>7 believe were previously disclosed in discovery,</p> <p>8 did you do anything to confirm or identify which</p> <p>9 documents those were?</p> <p>10 A. Again, they're going to be</p> <p>11 predominantly the Bates-numbered documents that</p> <p>12 were produced from Defendant through counsel to</p> <p>13 me.</p> <p>14 Q. Other than the Bell &amp; Howell</p> <p>15 Bates-stamped documents, are there any other</p> <p>16 documents that you did not produce from your</p> <p>17 system on the basis that you believed they had</p> <p>18 already been produced in litigation?</p> <p>19 A. Not that I can recollect as I sit here</p> <p>20 today.</p> <p>21 Q. With respect to any additional</p> <p>22 documents that either yourself and/or jointly</p> <p>23 with counsel determined to not be responsive or</p> <p>24 disclosable pursuant to Rule 26, do you have any</p> <p>25 documentation identifying those documents?</p> <p>218</p>	<p>1 WEIR</p> <p>2 convergence in that middle 55 percent range which</p> <p>3 corresponds with the Harriet Carter data.</p> <p>4 Q. The data that underlies those percent</p> <p>5 figures set forth in this document, where is</p> <p>6 that or --</p> <p>7 MR. ARISOHN: Object to form.</p> <p>8 Q. -- is that underlying data on your</p> <p>9 system?</p> <p>10 A. I probably do have a reference</p> <p>11 materials section that would include this data</p> <p>12 that we maintain on a regular basis.</p> <p>13 Q. So, looking at the --</p> <p>14 A. Let me -- sorry to interrupt you, but,</p> <p>15 I just want to clarify my last answer, which is</p> <p>16 that these are all publicly available pieces of</p> <p>17 information. There's nothing proprietary or I</p> <p>18 haven't done anything to the data, per se.</p> <p>19 Q. The first first column states -- it is</p> <p>20 "Harriet Carter Dollar Share Sales," appears to</p> <p>21 be the column, correct?</p> <p>22 MR. ARISOHN: Object to form.</p> <p>23 Q. The first column of percentages.</p> <p>24 A. The third column on the sheet, the</p> <p>25 first column of percentages, is the Harriet</p> <p>220</p>



<p>1 WEIR</p> <p>2 Carter market share by dollar sales percentages.</p> <p>3 Yes.</p> <p>4 Q. And that is determined based on your</p> <p>5 review of Harriet Carter sales records, correct?</p> <p>6 A. Correct.</p> <p>7 Q. And the determination of those</p> <p>8 percentages, how was that accomplished?</p> <p>9 A. Of the Harriet Carter?</p> <p>10 Q. Yes.</p> <p>11 A. I believe we summed the sales for the</p> <p>12 Harriet Carter data on a state-by-state basis and</p> <p>13 for the nationwide and divided each state by the</p> <p>14 nationwide amount to arrive at a percentage, and</p> <p>15 then, for the 25-state class, summed up each</p> <p>16 percentage factor for the 25 states to arrive at</p> <p>17 the 55 percent figure.</p> <p>18 Q. Did you perform that analysis with</p> <p>19 respect to each model of pest repellents that was</p> <p>20 sold by Harriet Carter?</p> <p>21 A. I don't believe so. No.</p> <p>22 Q. Do you know how many models of pest</p> <p>23 repellents were sold by Harriet Carter?</p> <p>24 A. That data is knowable from the</p> <p>25 underlying retail data, but I don't have a</p> <p style="text-align: right;">221</p>	<p>1 WEIR</p> <p>2 class or the non-25-state class information as</p> <p>3 being validated through numerous sources and</p> <p>4 cross-checks.</p> <p>5 Q. Did you perform any of those</p> <p>6 cross-checks with respect to the states that were</p> <p>7 not included in the state-specific class?</p> <p>8 A. Again, it's just an inversion of these</p> <p>9 numbers, so, I would say, yes.</p> <p>10 I didn't look on a state-by-state</p> <p>11 basis, but, in the aggregate, the numbers are</p> <p>12 reflective of both the 25-state multistate class</p> <p>13 and the states that are not included in the</p> <p>14 multistate class.</p> <p>15 Q. In the -- I believe it is the fourth</p> <p>16 column on this sheet, where did you get the</p> <p>17 underlying data for those figures?</p> <p>18 A. The original source would be the</p> <p>19 U.S. Bureau of Census website, but I believe I</p> <p>20 had already possessed that data at the time that</p> <p>21 I conducted this cross-check.</p> <p>22 Q. Your report that you have disclosed in</p> <p>23 this case does not state that you referenced any</p> <p>24 Census data, correct?</p> <p>25 A. It does not overtly mention that, but,</p> <p style="text-align: right;">223</p>
<p>1 WEIR</p> <p>2 precise recollection as I sit here today.</p> <p>3 Q. Did you do anything to determine</p> <p>4 whether the state-specific retail sales data</p> <p>5 between products was consistent amongst all of</p> <p>6 the states?</p> <p>7 A. It's my understanding that in the</p> <p>8 aggregate we have accurate figures based on</p> <p>9 Harriet Carter data and the government data that</p> <p>10 I have here. I was not looking at any one</p> <p>11 specific product or any one specific state.</p> <p>12 Q. So, you believe that in totality these</p> <p>13 numbers are accurate?</p> <p>14 A. That's correct.</p> <p>15 Q. Did you do any similar analysis or</p> <p>16 comparison with respect to states that were not</p> <p>17 included in this state-specific class?</p> <p>18 A. Well, this would, by default, turn out</p> <p>19 the same result if we were to flip this on its</p> <p>20 head. Because, we would be looking at the net of</p> <p>21 the 25 states, which would be 45 percent, and we</p> <p>22 would be looking at the net of the 25 states for</p> <p>23 the indices, which would show 41 to 48 percent.</p> <p>24 So, again, I would say the answer is,</p> <p>25 yes, we can understand the -- either the 25-state</p> <p style="text-align: right;">222</p>	<p>1 WEIR</p> <p>2 here are the work papers that shows that it's</p> <p>3 been done.</p> <p>4 Q. This is a document that was produced</p> <p>5 to me today, correct?</p> <p>6 A. It may very well have been produced to</p> <p>7 you at some other time, but, I know it's been</p> <p>8 produced to you today.</p> <p>9 Q. There's nothing in your report, your</p> <p>10 report that states this:</p> <p>11 "I have identified all of the</p> <p>12 information on which I have reviewed and relied.</p> <p>13 There is nothing in that report that states I had</p> <p>14 reviewed and relied on the Census data with</p> <p>15 respect to my analysis."</p> <p>16 Correct?</p> <p>17 A. Again, I would refer you back to where</p> <p>18 I refer to my educational background and 14 years</p> <p>19 of expertise in analyzing this type of data,</p> <p>20 where I bring to bear, as a sanity check, my</p> <p>21 understanding of the availability and content of</p> <p>22 Bureau of Economic Analysis data that I used as a</p> <p>23 cross-check against the Harriet Carter --</p> <p>24 Q. And you understand the difference</p> <p>25 between analysis and data, correct?</p> <p style="text-align: right;">224</p>





<p>1 <b>WEIR</b></p> <p>2 MR. ARISOHN: Object to form.</p> <p>3 THE WITNESS: I don't quite</p> <p>4 understand.</p> <p>5 <b>Q. Your experience leads you to the</b></p> <p>6 <b>availability of this and the potential analysis,</b></p> <p>7 <b>correct?</b></p> <p>8 A. And an analysis that I performed, as</p> <p>9 reflected by this document.</p> <p>10 <b>Q. But, the underlying data to the</b></p> <p>11 <b>document does not come from your 14 years of</b></p> <p>12 <b>experience, correct?</b></p> <p>13 A. It's been sitting in my network server</p> <p>14 for years.</p> <p>15 <b>Q. But, it has a source and the source is</b></p> <p>16 <b>the Census Bureau, correct?</b></p> <p>17 A. Well, I would describe it generally as</p> <p>18 the Bureau of Economic Analysis. The subdivision</p> <p>19 for the Census data is the Census Bureau.</p> <p>20 But, these are all data that I have</p> <p>21 used and relied upon in many cases to sanity</p> <p>22 check data such as the Harriet Carter sales data,</p> <p>23 which is the foundation of my opinion about the</p> <p>24 average retail pricing information that I use in</p> <p>25 my Declaration.</p> <p style="text-align: right;">225</p>	<p>1 <b>WEIR</b></p> <p>2 <b>forth in this document, correct?</b></p> <p>3 A. No. I believe from my experience that</p> <p>4 the Harriet Carter data could be used to</p> <p>5 extrapolate to the states. I just simply used</p> <p>6 this other data to verify that that happened to</p> <p>7 be correct and, lo and behold, that data bears it</p> <p>8 out.</p> <p>9 <b>Q. Prior to this case, had you ever had a</b></p> <p>10 <b>case where you reviewed Harriet Carter sales</b></p> <p>11 <b>information?</b></p> <p>12 A. It's very likely. I review retailer</p> <p>13 data on a weekly basis.</p> <p>14 <b>Q. Do you, as you sit here, ever recall</b></p> <p>15 <b>reviewing Harriet Carter sales information?</b></p> <p>16 A. I don't know that I can cite to you a</p> <p>17 specific example, but it's likely.</p> <p>18 <b>Q. Prior to this case had you ever used</b></p> <p>19 <b>state-specific Harriet Carter sales information</b></p> <p>20 <b>to extrapolate to other retailers?</b></p> <p>21 A. I've certainly done similar exercises</p> <p>22 where I used a single retailer data point to --</p> <p>23 well, first of all, we're not</p> <p>24 extrapolating to other retailers, we're</p> <p>25 extrapolating -- or, no. Even "extrapolating" is</p> <p style="text-align: right;">227</p>
<p>1 <b>WEIR</b></p> <p>2 <b>Q. So, this is data that you relied on as</b></p> <p>3 <b>the foundation of your opinions as it relates to</b></p> <p>4 <b>this specific class?</b></p> <p>5 A. The Harriet Carter data is the sales</p> <p>6 data that I relied upon as the foundation of my</p> <p>7 opinion as to the average retail price points for</p> <p>8 the various pest repellents in this case.</p> <p>9 <b>Q. And the additional data in this</b></p> <p>10 <b>document was the foundation for your opinion that</b></p> <p>11 <b>data was reliable and could be utilized in that</b></p> <p>12 <b>manner, correct?</b></p> <p>13 MR. ARISOHN: Object to form.</p> <p>14 THE WITNESS: I have looked at the</p> <p>15 population and expenditure data in order to</p> <p>16 verify and sanity check the Harriet Carter</p> <p>17 sales data.</p> <p>18 <b>Q. And one of your opinions in this case</b></p> <p>19 <b>is that the Harriet Carter sales data could be</b></p> <p>20 <b>extrapolated to the other non-Harriet Carter</b></p> <p>21 <b>retailers, correct?</b></p> <p>22 A. Yes. I believe it's usable in terms</p> <p>23 of allocating things on a state-by-state basis.</p> <p>24 <b>Q. And included in the foundation of that</b></p> <p>25 <b>opinion is your review of the statistics set</b></p> <p style="text-align: right;">226</p>	<p>1 <b>WEIR</b></p> <p>2 the wrong word.</p> <p>3 We're using the Harriet Carter data to</p> <p>4 allocate state sales on a state-by-state basis.</p> <p>5 That's what I've done. And I've used similar</p> <p>6 retail sales data and government sales data in</p> <p>7 the past to make similar determinations and</p> <p>8 allocations on a state-by-state basis.</p> <p>9 <b>Q. You stated earlier the foundation for</b></p> <p>10 <b>your opinion that the Harriet Carter sales data</b></p> <p>11 <b>was reliable to extrapolate to other states was</b></p> <p>12 <b>based on your experience and education?</b></p> <p>13 A. That's correct. I make these types of</p> <p>14 apportionments in many cases on a regular basis.</p> <p>15 <b>Q. But, previous to this had you ever</b></p> <p>16 <b>reviewed Harriet Carter sales information or done</b></p> <p>17 <b>any analysis to show that it was representative</b></p> <p>18 <b>of brick and mortar sales, for example?</b></p> <p>19 A. Again, I have analyzed many, many,</p> <p>20 many retailer sales data and made many</p> <p>21 apportionments on a state-by-state basis using</p> <p>22 retailer data points, population data points,</p> <p>23 share of expenditure data points.</p> <p>24 Based upon my review of the Harriet</p> <p>25 Carter data, I felt that was reasonable to do in</p> <p style="text-align: right;">228</p>



<p>1 WEIR</p> <p>2 this case. I also felt like it was reasonable to</p> <p>3 do a sanity check. I did that. That confirmed</p> <p>4 my suspicions based on my expertise. And here we</p> <p>5 are, I've used the Harriet Carter data.</p> <p>6 Q. So, it's your testimony that you're</p> <p>7 able to look at the Harriet Carter sales data and</p> <p>8 say, "Based on that, I believe that it is</p> <p>9 reliable that Colorado would have two percent of</p> <p>10 the retail sales of these devices"?</p> <p>11 A. Based upon my review of Harriet Carter</p> <p>12 sales data, based upon my past experience</p> <p>13 reviewing dozens or hundreds of retailer sales</p> <p>14 data, based upon on my understanding of</p> <p>15 population and share of expenditure data, I</p> <p>16 believe that, in the aggregate, across the</p> <p>17 25-state class, that the estimate produced by</p> <p>18 Harriet Carter of 55 percent is eminently</p> <p>19 reasonable or conservative.</p> <p>20 That's been confirmed prior to the</p> <p>21 execution of this document by the government data</p> <p>22 and it's been confirmed after the execution of</p> <p>23 this document by the claims administration data</p> <p>24 that shows, once again, that Harriet Carter data</p> <p>25 was representative of the 25-state subclass.</p> <p>229</p>	<p>1 WEIR</p> <p>2 because I'm interested in the aggregate</p> <p>3 information across the 25-state class.</p> <p>4 Q. And if you had information that any</p> <p>5 retailers did not sell a specific device in a</p> <p>6 specific state, that would not undermine your</p> <p>7 opinion that Harriet Carter is representative of</p> <p>8 all retailers in all states?</p> <p>9 A. Given all the information I have,</p> <p>10 absolutely not. I believe, again, that in the</p> <p>11 aggregate we have a very good estimate of the</p> <p>12 25-state subclass sales based upon the Harriet</p> <p>13 Carter data, based upon the nationwide sales</p> <p>14 data, based upon the California state-specific</p> <p>15 information that we already have.</p> <p>16 All of these data points align to</p> <p>17 suggest that the information in the aggregate</p> <p>18 contained in Table 3 is a reliable estimate of</p> <p>19 the state retail sales for the 25-state</p> <p>20 multistate class.</p> <p>21 Q. So, looking at this table, the one</p> <p>22 state for which you had, other than Harriet</p> <p>23 Carter state-specific information is California,</p> <p>24 correct?</p> <p>25 A. Well, and we had a 50-state nationwide</p> <p>231</p>
<p>1 WEIR</p> <p>2 Q. And your analysis of the class notice</p> <p>3 data, that occurred after your disclosure in this</p> <p>4 case, correct?</p> <p>5 A. Correct. I think I just said that.</p> <p>6 Q. Did you do anything to determine</p> <p>7 which, if any, of these retailers actually sold</p> <p>8 devices in these states?</p> <p>9 A. Again, I'm not concerned with any one</p> <p>10 retailer, I'm concerned with the determination of</p> <p>11 retail sales in the aggregate to the class.</p> <p>12 And so, I focus my analysis on the</p> <p>13 nationwide sales, the California sales and the</p> <p>14 apportionment of the nationwide sales to the</p> <p>15 25-state subclass in the aggregate.</p> <p>16 Q. As part of your determination of the</p> <p>17 class-wide -- the statewide class, would that not</p> <p>18 include determining which, if any, devices were</p> <p>19 sold in each of these individual states?</p> <p>20 A. Again, I've made that apportionment</p> <p>21 based on the Harriet Carter data and I believe</p> <p>22 that that data is accurate, but I don't need to</p> <p>23 understand, as your previous question was trying</p> <p>24 to elicit, information about what any one</p> <p>25 retailer has done in any particular state,</p> <p>230</p>	<p>1 WEIR</p> <p>2 piece of information, which is informative, as</p> <p>3 well.</p> <p>4 Q. As far as state-specific information,</p> <p>5 the one state that you had been provided with</p> <p>6 documentation from the retailers of</p> <p>7 state-specific sales was California, correct?</p> <p>8 A. I have California sales data and I</p> <p>9 have nationwide sales data, which is reflective</p> <p>10 of all 50 states.</p> <p>11 Q. As an aggregate, not individually,</p> <p>12 correct?</p> <p>13 A. Well, the aggregate is the sum of all</p> <p>14 the individual components. So, we have an</p> <p>15 understanding of what the upper bound of the</p> <p>16 state sales could be. That's a useful data</p> <p>17 point.</p> <p>18 Q. The fifth column in this report, the</p> <p>19 underlying data for those numbers, where did you</p> <p>20 get that data?</p> <p>21 A. Those are GDP PCE, personal</p> <p>22 consumption and expenditure data.</p> <p>23 Q. And where is that data compiled? By</p> <p>24 whom is it compiled?</p> <p>25 A. Again, my understanding is that the</p> <p>232</p>



<p>1 WEIR</p> <p>2 overarching agency is the Bureau of Economic</p> <p>3 Analysis. That's data that has been in my</p> <p>4 possession for years and is summarized here in</p> <p>5 this table.</p> <p>6 Q. The data that you are referring to,</p> <p>7 what does it encompass? Here we have share of</p> <p>8 exterminating and pest control service sales,</p> <p>9 correct?</p> <p>10 A. Correct.</p> <p>11 Q. Is that a specific category within the</p> <p>12 data that you are discussing?</p> <p>13 A. Yes.</p> <p>14 Q. And do you know what is encompassed</p> <p>15 within that category?</p> <p>16 A. It's a category that involves</p> <p>17 exterminating and pest control services. So, for</p> <p>18 example, you call up an exterminator and they</p> <p>19 come to your house and exterminate pests.</p> <p>20 Q. The data to which you are referring,</p> <p>21 is it maintained as a percentage in this way?</p> <p>22 A. I believe it's available as a</p> <p>23 percentage and also a share of total expenditure</p> <p>24 based on the category.</p> <p>25 Q. And did you do anything to verify that</p> <p>233</p>	<p>1 WEIR</p> <p>2 pest control services?</p> <p>3 A. Correct. It's a category related to</p> <p>4 pest control and extermination.</p> <p>5 Q. Does it specify that it involves sale</p> <p>6 of pest control products?</p> <p>7 A. I believe it involves all expenditures</p> <p>8 on pest control and extermination.</p> <p>9 Q. It specifies exterminating and pest</p> <p>10 control services, correct?</p> <p>11 A. That's what the category name is.</p> <p>12 Yes.</p> <p>13 Q. And is there some other document that</p> <p>14 specifies that it includes the sale of pest</p> <p>15 control products?</p> <p>16 A. I would have to go back and</p> <p>17 double-check. As I sit here today, I don't have</p> <p>18 a precise recollection.</p> <p>19 Q. And to the extent there is such a</p> <p>20 description, is it set forth in some</p> <p>21 documentation?</p> <p>22 A. I mean, you're begging the question.</p> <p>23 I don't have a recollection if something exists,</p> <p>24 so I can't describe to you in how it would exist,</p> <p>25 since I don't have a recollection of it as I sit</p> <p>235</p>
<p>1 WEIR</p> <p>2 this category of information was relevant or</p> <p>3 relevant to this matter?</p> <p>4 A. Yes. I looked at the PCE information</p> <p>5 about what that category is about and then</p> <p>6 understood that this is about the sale of pest</p> <p>7 repellers, and I find overlap in those categories</p> <p>8 and believe that this category, along with other</p> <p>9 pieces of information, provides a useful sanity</p> <p>10 check.</p> <p>11 Q. And what is your basis for your</p> <p>12 opinion that there was some overlap between the</p> <p>13 issues in this case and that category of</p> <p>14 information?</p> <p>15 A. One thing would be just literally the</p> <p>16 name of the category and the type of products</p> <p>17 that are at issue in this case.</p> <p>18 Q. Did you do anything to determine what,</p> <p>19 if any, portion of that data involved ultrasonic</p> <p>20 pest repellers or non-lethal pest repellers?</p> <p>21 MR. ARISOHN: Object to form.</p> <p>22 THE WITNESS: I did not.</p> <p>23 Q. This would include both hiring an</p> <p>24 exterminator to come out to your house, to your</p> <p>25 understanding, as well as anything else involving</p> <p>234</p>	<p>1 WEIR</p> <p>2 here today.</p> <p>3 Q. It's your testimony that you reviewed</p> <p>4 this information and relied upon it in some</p> <p>5 manner in developing your opinions or analyzing</p> <p>6 this data, correct?</p> <p>7 A. Absolutely.</p> <p>8 Q. You would agree that you have some</p> <p>9 responsibility to verify that it is relevant or</p> <p>10 that it applies to the issues involved in the</p> <p>11 case, correct?</p> <p>12 A. Yeah. And 12 months ago I made that</p> <p>13 determination.</p> <p>14 Q. So, it's your testimony that you did</p> <p>15 review that information and make that</p> <p>16 determination?</p> <p>17 A. I reviewed all the information that I</p> <p>18 felt was necessary at the time to determine that</p> <p>19 that category, as intended by the federal</p> <p>20 government, was useful in a sanity check against</p> <p>21 the Harriet Carter data in this case.</p> <p>22 Q. And again, if we review your</p> <p>23 disclosures in this case, nowhere does it</p> <p>24 reference or refer to this category of</p> <p>25 information or the underlying data, correct?</p> <p>236</p>



<p>1 WEIR</p> <p>2 A. My disclosure is going to indicate</p> <p>3 that I bring to bear my 14 years of experience.</p> <p>4 And using this government information to</p> <p>5 cross-check other pieces of information in a</p> <p>6 litigation is something that I draw on my years</p> <p>7 of experience in doing and understanding.</p> <p>8 Q. You could not do this analysis without</p> <p>9 reviewing the data, correct?</p> <p>10 A. Again, I already possess the data,</p> <p>11 because I use it on a regular basis.</p> <p>12 Q. You reviewed the data, correct?</p> <p>13 A. Again, I put it in the spreadsheet and</p> <p>14 compared the results.</p> <p>15 Q. And comparing the results involves</p> <p>16 reviewing the data to compare those results,</p> <p>17 correct?</p> <p>18 A. I've reviewed the results which shows</p> <p>19 Harriet Carter, 55 percent; population,</p> <p>20 59 percent; pest control services, 52 percent;</p> <p>21 retail trade sales, 59 percent.</p> <p>22 Q. The final column, what does that</p> <p>23 column refer to?</p> <p>24 A. That is personal consumption</p> <p>25 expenditure data on retail trade. So, for</p> <p style="text-align: right;">237</p>	<p>1 WEIR</p> <p>2 A. It is data that is relevant to the</p> <p>3 class period. It's not ten years old. But, as</p> <p>4 to the precise date, I don't have a memory of</p> <p>5 that, as I sit here today.</p> <p>6 Q. And your determination of "relevant of</p> <p>7 the class period," what did you do to determine</p> <p>8 what information was relevant to the class</p> <p>9 period?</p> <p>10 A. That the data was drawn from within</p> <p>11 the class period.</p> <p>12 Q. So, "Retail Trade Sales," that</p> <p>13 involves the sale of all retail products?</p> <p>14 A. I don't know if it's all retail</p> <p>15 products, but it's a category of retail products.</p> <p>16 Q. What do you mean by "a category of</p> <p>17 retail products"?</p> <p>18 A. It is not one single retail product,</p> <p>19 it's a collection of retail products.</p> <p>20 Q. And with respect to these numbers,</p> <p>21 what is the collection of retail products that</p> <p>22 you are discussing?</p> <p>23 A. It is a category of products that</p> <p>24 would include things like the Bell &amp; Howell pest</p> <p>25 repellers, but I don't know that I could</p> <p style="text-align: right;">239</p>
<p>1 WEIR</p> <p>2 example, buying consumer items, such as pest</p> <p>3 repellers.</p> <p>4 Q. So, from where does that data come?</p> <p>5 A. Again, that's data that I've had in my</p> <p>6 possession for some time, but the original source</p> <p>7 of the data would be the Bureau of Economic</p> <p>8 Analysis.</p> <p>9 Q. I notice that for the third column</p> <p>10 population share you have an average over a span</p> <p>11 of years, correct?</p> <p>12 A. Correct.</p> <p>13 Q. With respect to the other two columns</p> <p>14 you do not provide any sort of date range,</p> <p>15 correct?</p> <p>16 A. Not in this spreadsheet.</p> <p>17 Q. The numbers that are set forth in this</p> <p>18 document that you have had in your possession for</p> <p>19 some time, do you have any idea what the date</p> <p>20 range for that data is?</p> <p>21 A. Not as I sit here today. I would have</p> <p>22 to go back and look that up for you.</p> <p>23 Q. So, you can't state whether this is</p> <p>24 data that's ten years old or whether this is data</p> <p>25 that is current?</p> <p style="text-align: right;">238</p>	<p>1 WEIR</p> <p>2 enumerate everything that's included in the</p> <p>3 category, as I sit here today.</p> <p>4 Q. This last column in this document</p> <p>5 says, "Share Retail Trade Sales," correct?</p> <p>6 A. Correct.</p> <p>7 Q. And you stated that that involves a</p> <p>8 category of retail sales, correct?</p> <p>9 A. It is itself its own index, so, the</p> <p>10 column heading is referring to that index of</p> <p>11 data.</p> <p>12 Q. And the index of data is titled</p> <p>13 "Retail Trade Sales"?</p> <p>14 A. Correct.</p> <p>15 Q. And what does that category encompass?</p> <p>16 A. Products such as Bell &amp; Howell pest</p> <p>17 repellers, as well as other products, but, I</p> <p>18 can't name every one of them for you as I sit</p> <p>19 here today.</p> <p>20 Q. Categorically, what does it include?</p> <p>21 I'm guessing that the information does not state</p> <p>22 products such as the Bell &amp; Howell pest</p> <p>23 repellers.</p> <p>24 How did you determine that the Bell &amp;</p> <p>25 Howell pest repeller fits within the category of</p> <p style="text-align: right;">240</p>





<p>1 WEIR</p> <p>2 data set forth in this column?</p> <p>3 A. Based upon my general understanding of</p> <p>4 the nature of that data. And it may very well</p> <p>5 fit within the description of that data, as well.</p> <p>6 But, as to the precise description of</p> <p>7 that, I don't recall it. I haven't memorized it,</p> <p>8 as I sit here today.</p> <p>9 Q. And where would the description of the</p> <p>10 category, where would that information be found?</p> <p>11 A. I'm sure it's publicly available from</p> <p>12 the Bureau of Economic Analysis.</p> <p>13 Q. Do you know that it's publicly known?</p> <p>14 A. Yes. I just said I'm sure it's</p> <p>15 available from the Bureau of Economic Analysis.</p> <p>16 Q. Did you review that product</p> <p>17 description in determining that this number was</p> <p>18 relevant to your analysis in this case?</p> <p>19 A. Some time ago, yes.</p> <p>20 Q. And again, there's nothing in your</p> <p>21 report that discloses that you reviewed or relied</p> <p>22 upon the data, this share of retail trade sales</p> <p>23 data, correct?</p> <p>24 A. I disagree with that characterization.</p> <p>25 Again, I identify my many years of experience and</p> <p style="text-align: right;">241</p>	<p>1 WEIR</p> <p>2 Carter falls squarely in the middle.</p> <p>3 Q. For example, so, again, as we stated,</p> <p>4 the one state for which you had been provided and</p> <p>5 delineated or that you had been provided and</p> <p>6 delineated sales data for was California,</p> <p>7 correct?</p> <p>8 A. I had specific sales data for the</p> <p>9 state of California and I had 50-state data in</p> <p>10 the nationwide sales data.</p> <p>11 Q. So, if we look at the Harriet Carter</p> <p>12 sales for California, according to this document,</p> <p>13 those were seven percent, correct?</p> <p>14 A. I believe that's approximately</p> <p>15 correct.</p> <p>16 Q. And if we look at the next column, the</p> <p>17 population average is 12 percent, correct?</p> <p>18 A. That's correct.</p> <p>19 Q. And the share of exterminating pest</p> <p>20 control services are 15 percent?</p> <p>21 A. Yes. Correct.</p> <p>22 Q. And the share of retail trade sales</p> <p>23 were 11 percent, correct?</p> <p>24 A. Correct.</p> <p>25 Q. So, for the one state for which you</p> <p style="text-align: right;">243</p>
<p>1 WEIR</p> <p>2 educational background, and this is information</p> <p>3 that I bring both from my education and from my</p> <p>4 experience as a useful cross-check against the</p> <p>5 litigation-specific Harriet Carter data, upon</p> <p>6 which I rely in my Declaration.</p> <p>7 Q. Your Declaration in this case does not</p> <p>8 specifically identify these sources of</p> <p>9 information as data and information that you</p> <p>10 reviewed in forming your opinions, correct?</p> <p>11 MR. ARISOHN: Asked and answered.</p> <p>12 Objection.</p> <p>13 THE WITNESS: I do stand by my last</p> <p>14 fulsome answer to that question.</p> <p>15 Q. Did you do any statistical analysis</p> <p>16 with respect to the various percentages set forth</p> <p>17 in this document?</p> <p>18 A. That is the statistical analysis.</p> <p>19 Q. So, did you do any analysis as to</p> <p>20 whether there was a statistical significance</p> <p>21 between any of these individual --</p> <p>22 A. That's self-evident from the range of</p> <p>23 the data.</p> <p>24 So, we have data ranging from 52 to</p> <p>25 59 percent from the cross-checks and the Harriet</p> <p style="text-align: right;">242</p>	<p>1 WEIR</p> <p>2 had specific information, these other data</p> <p>3 sources that you looked at were at least</p> <p>4 50 percent higher than the Harriet Carter</p> <p>5 percentages, correct?</p> <p>6 A. Again, I'm not looking at any one</p> <p>7 specific state, nor am I relying on these data</p> <p>8 points for the state of California, for which I</p> <p>9 have that data.</p> <p>10 I'm relying on these data to</p> <p>11 cross-check the aggregate impact of the Harriet</p> <p>12 Carter data across the 25-state class, and that</p> <p>13 shows between a three and four percentage point</p> <p>14 difference between the cross-checks and the</p> <p>15 Harriet Carter sales data, in the aggregate,</p> <p>16 class-wide for the multistate class.</p> <p>17 Q. But, the fact that the one state for</p> <p>18 which you had specific data was significantly</p> <p>19 different than the data in the other data</p> <p>20 sources, that didn't give you any pause as to the</p> <p>21 reliability of the state breakdown of this data?</p> <p>22 A. No. Because, I'm aggregating the data</p> <p>23 across 25 states. And you will see that some of</p> <p>24 the states are plus, some of the states are</p> <p>25 minus.</p> <p style="text-align: right;">244</p>



<p>1 WEIR</p> <p>2 But, in the aggregate, they reflect</p> <p>3 the accurate distribution of sales as between the</p> <p>4 25-state multi-class. And that is what I was</p> <p>5 interested in, was the aggregate damages to the</p> <p>6 class as a whole.</p> <p>7 Q. Did you do anything to determine,</p> <p>8 other than this document here, to confirm that,</p> <p>9 ultrasonic pest repellers specifically, that</p> <p>10 there was no difference in consumer behavior</p> <p>11 between states?</p> <p>12 A. The analysis of the retail sales in</p> <p>13 this case, the wholesale sales in this case, the</p> <p>14 Harriet Carter data specifically and the</p> <p>15 government indices data describes the work that I</p> <p>16 did to verify the state-by-state breakdowns to</p> <p>17 the multistate class; as it relates to my work</p> <p>18 completed by October 31, 2017, new data has come</p> <p>19 to light that verifies that work for the</p> <p>20 multistate class.</p> <p>21 Q. But, your opinion, as set forth in</p> <p>22 your Declaration, obviously, was not based in any</p> <p>23 way on data that you have subsequently been</p> <p>24 provided, correct?</p> <p>25 A. No. My data was based, as I just</p> <p style="text-align: right;">245</p>	<p>1 WEIR</p> <p>2 have received.</p> <p>3 Q. With respect to the opinions set forth</p> <p>4 in your report that was submitted and filed in</p> <p>5 October of 2017, did you rely on any sources of</p> <p>6 data and information that are not specifically</p> <p>7 identified in that document in compiling those</p> <p>8 opinions?</p> <p>9 A. Again, I think the things that we've</p> <p>10 identified today are the things that come to</p> <p>11 mind, as I sit here right now.</p> <p>12 Q. So, you can't confirm or deny if there</p> <p>13 were other sources of data information that you</p> <p>14 reviewed in drafting your opinions that are not</p> <p>15 disclosed in the report?</p> <p>16 A. Other than the things that we've</p> <p>17 discussed on the record today, nothing else is</p> <p>18 coming to mind. But, that's as I sit here today,</p> <p>19 to the best of my recollection.</p> <p>20 Q. Your testimony is that there may be</p> <p>21 other sources of data or information that you</p> <p>22 reviewed in drafting this report that were not</p> <p>23 disclosed in the report?</p> <p>24 THE WITNESS: Would you read back my</p> <p>25 last substantive answer, please?</p> <p style="text-align: right;">247</p>
<p>1 WEIR</p> <p>2 said, upon my review of the wholesale data, the</p> <p>3 retail data, the Harriet Carter data</p> <p>4 specifically, the government index data.</p> <p>5 And lo and behold, when you get a new</p> <p>6 piece of data that you can gain access to, it</p> <p>7 confirms that I was correct in my assessment of</p> <p>8 the Harriet Carter data at the time that I</p> <p>9 executed my document on October 31, 2017.</p> <p>10 Q. As of yet -- I believe I have asked</p> <p>11 this -- you have not completed any documented</p> <p>12 analysis of this subsequent information that</p> <p>13 you've received, correct?</p> <p>14 A. That is a work in progress.</p> <p>15 Q. Other than the three sources of data</p> <p>16 that are reflected in that spreadsheet that was</p> <p>17 recently provided to me, is there any other</p> <p>18 source of data or information that you reviewed</p> <p>19 or utilized in this case that is not specifically</p> <p>20 identified in your Declaration?</p> <p>21 THE WITNESS: Would you read that</p> <p>22 back, please.</p> <p>23 (Record read.)</p> <p>24 THE WITNESS: Yes. The Boedeker</p> <p>25 Declaration and the class notice data that I</p> <p style="text-align: right;">246</p>	<p>1 WEIR</p> <p>2 (Record read.)</p> <p>3 THE WITNESS: That's my best answer to</p> <p>4 your question.</p> <p>5 (Exhibit No. 8, Spreadsheet, Walmart</p> <p>6 Sales Data, marked for identification as of</p> <p>7 this date.)</p> <p>8 Q. Do you recognize this document?</p> <p>9 A. Yes.</p> <p>10 Q. What is this document?</p> <p>11 A. This is some raw Walmart sales data</p> <p>12 and a statistical comparison of the difference</p> <p>13 between a three-pack of pest repellers and a</p> <p>14 three-pack of pest repellers with a light.</p> <p>15 And it demonstrates that there is no</p> <p>16 statistically significant difference in price</p> <p>17 between those two products.</p> <p>18 Q. So, the first page of the document,</p> <p>19 that is what you're referring to as the raw data,</p> <p>20 correct?</p> <p>21 A. I think the raw data may roll onto the</p> <p>22 second page, as well, but the statistical</p> <p>23 comparison takes place on the second page.</p> <p>24 Q. Did you do a similar statistical</p> <p>25 comparison with respect to any other items than</p> <p style="text-align: right;">248</p>



<p>1 WEIR</p> <p>2 the two that are set forth in this document?</p> <p>3 A. I made similar comparisons, but did</p> <p>4 not feel the need to conduct a t-statistic test,</p> <p>5 as is shown here, due to the close nature of the</p> <p>6 price comparison that I was able to see in the</p> <p>7 raw data.</p> <p>8 Q. So, other this document that's in</p> <p>9 front of us, you did not perform a similar t-test</p> <p>10 with respect to any other devices?</p> <p>11 A. So, just so the record is clear, I</p> <p>12 performed similar comparisons that identified</p> <p>13 little or no difference in price, but it was not</p> <p>14 necessary to conduct additional t-tests because</p> <p>15 the pricing data was so close that one could tell</p> <p>16 facially that there was no statistically</p> <p>17 significantly different -- sorry -- no</p> <p>18 statistically significantly difference in price.</p> <p>19 Q. Please listen to my question and</p> <p>20 provide an answer.</p> <p>21 You did not, with respect to any other</p> <p>22 devices, perform a t-test to compare any other</p> <p>23 devices than the two set forth in this report,</p> <p>24 correct?</p> <p>25 A. I conducted a number of additional</p> <p>249</p>	<p>1 WEIR</p> <p>2 the raw data.</p> <p>3 Q. So, other than this document, any</p> <p>4 other comparison was done simply by you reviewing</p> <p>5 the raw data?</p> <p>6 A. Correct.</p> <p>7 Q. That's with respect to any devices,</p> <p>8 other than SKU number 50105 and unit number</p> <p>9 50161, correct?</p> <p>10 A. That's correct. I examined many</p> <p>11 devices other than those to make the</p> <p>12 determination that the ancillary features had no</p> <p>13 apparent statistically significant value in the</p> <p>14 marketplace.</p> <p>15 Q. Is that analysis documented anywhere</p> <p>16 other than in your report?</p> <p>17 A. The report is where I documented the</p> <p>18 results of that work.</p> <p>19 Q. Did you perform statistical comparison</p> <p>20 of retail pricing for devices with any retailers</p> <p>21 other than Walmart?</p> <p>22 A. Yes.</p> <p>23 Q. Did you perform a statistical analysis</p> <p>24 of those devices?</p> <p>25 A. Yes. I looked at the average retail</p> <p>251</p>
<p>1 WEIR</p> <p>2 comparisons after making this examination and</p> <p>3 made the determination that it was not necessary</p> <p>4 to conduct any additional t-tests because the</p> <p>5 data was self-evident in that there were no</p> <p>6 statistically significant differences in price as</p> <p>7 between products with and without any particular</p> <p>8 ancillary attribute.</p> <p>9 Q. Did you perform any t-testing with</p> <p>10 respect to other attributes than a night light?</p> <p>11 A. I conducted numerous additional</p> <p>12 product comparisons, such as this, but, because</p> <p>13 of the nature of the data, I did not need to</p> <p>14 conduct a t-test to understand that there was no</p> <p>15 statistically significant difference in price</p> <p>16 across many of the different attributes, other</p> <p>17 than a light.</p> <p>18 Q. Did you at any point quantify the</p> <p>19 different attributes that you were comparing with</p> <p>20 respect to pricing in this case?</p> <p>21 A. I looked across a number of different</p> <p>22 attributes, such as lights, outlets, I believe</p> <p>23 LEDs, size of device.</p> <p>24 There may have been other factors, but</p> <p>25 I made side-by-side comparisons of those using</p> <p>250</p>	<p>1 WEIR</p> <p>2 prices across comparable devices with and without</p> <p>3 a particular attribute, such as a light, to</p> <p>4 confirm that the market did not place any value,</p> <p>5 as measured by price, on the ancillary feature of</p> <p>6 those pest repellers.</p> <p>7 Q. So, when you say you performed a</p> <p>8 statistical analysis, you're saying that you</p> <p>9 looked at the devices and the prices looked</p> <p>10 similar?</p> <p>11 A. I looked at average pricing data and</p> <p>12 the pricing was either identical or not different</p> <p>13 in a statistical sense.</p> <p>14 Q. When you say "not different in the</p> <p>15 statistical sense," did you do any calculations</p> <p>16 as you did with these two devices to determine</p> <p>17 whether it was not different in a statistical</p> <p>18 sense?</p> <p>19 A. It was not necessary to do so, because</p> <p>20 a visual inspection of the data confirmed that</p> <p>21 there was no statistically significant difference</p> <p>22 in price due to the nature of the variation in</p> <p>23 price and the closeness of the averages price</p> <p>24 points fed into the analysis.</p> <p>25 MR. WING: If we can take a quick, we</p> <p>252</p>



<p>1 WEIR</p> <p>2 may be done.</p> <p>3 (Recess taken.)</p> <p>4 MR. WING: Mr. Weir, I think I am done</p> <p>5 with questions I have today.</p> <p>6 I will say that it seems like there</p> <p>7 may be documents that we have not received</p> <p>8 that I know that you have stated -- we will</p> <p>9 figure that out.</p> <p>10 And to the extent there's information</p> <p>11 that you are now currently reviewing that</p> <p>12 was produced subsequent to your disclosure</p> <p>13 and that there are opinions or that you are</p> <p>14 supplementing things, we would reserve the</p> <p>15 right to re-call him.</p> <p>16 Other than that, we are done today.</p> <p>17 MR. ARISOHN: All right. I don't have</p> <p>18 any questions.</p> <p>19 THE WITNESS: I'm sure Toni has done a</p> <p>20 great job with the transcript, but I'll</p> <p>21 reserve my right to read and sign.</p> <p>22 (Time noted: 4:21 p.m.)</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">253</p>	<p>1 C E R T I F I C A T E</p> <p>2</p> <p>3 STATE OF NEW YORK )</p> <p>4 : ss</p> <p>5 COUNTY OF NEW YORK )</p> <p>6</p> <p>7 I, TONI FREEMAN GREENE, a Notary</p> <p>8 Public within and for the State of New York, do</p> <p>9 hereby certify:</p> <p>10 That COLIN WEIR, the witness whose</p> <p>11 deposition is hereinbefore set forth, was duly</p> <p>12 sworn by me and that such deposition is a true</p> <p>13 record of the testimony given by such witness.</p> <p>14 I further certify that I am not</p> <p>15 related to any of the parties to this action by</p> <p>16 blood or marriage and that I am in no way</p> <p>17 interested in the outcome of this matter.</p> <p>18 IN WITNESS WHEREOF, I have hereunto</p> <p>19 set my hand this 22nd day of January, 2018.</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24 _____</p> <p>25 TONI FREEMAN GREENE</p> <p style="text-align: right;">255</p>
<p>1 A C K N O W L E D G M E N T</p> <p>2</p> <p>3 STATE OF )</p> <p>4 :ss</p> <p>5 COUNTY OF )</p> <p>6</p> <p>7 I, COLIN WEIR, hereby certify that I</p> <p>8 have read the transcript of my testimony taken</p> <p>9 under oath in my deposition of January 10, 2018;</p> <p>10 that the transcript is a true, complete and</p> <p>11 correct record of my testimony, and that the</p> <p>12 answers on the record as given by me are true</p> <p>13 and correct.</p> <p>14</p> <p>15</p> <p>16 _____</p> <p>17 COLIN WEIR</p> <p>18</p> <p>19</p> <p>20 Signed and subscribed to before me,</p> <p>21 this _____ day of _____, 2018.</p> <p>22</p> <p>23</p> <p>24 _____</p> <p>25 Notary Public, State of New York</p> <p style="text-align: right;">254</p>	





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